91-2058

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STACIA LEE SUMWALT and
DAVID RANDALL JENKINS,
Petitioners,

v.

FRED T. BOICE, in his official capacity
as trustee in bankruptcy, EQUITY
SECURITIES-HOLDERS'COMMITTEE, UNIVERSITY
OF ARIZONA, and HYDRO GEO CHEM, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 22, 1992

QUESTIONS PRESENTED

1. In codifying the mootness rule in Section 363(m) of Title 11, United States Code, did Congress clearly intend to preclude appellate review of Constitutional claims in cases where the Bankruptcy Court's taking of property involved substantive and procedural Constitutional Due Process violations?

2. Does the mootness rule apply to sales approved by a Bankruptcy Judge whose failure to disqualify violates the Due Process Clause of the Fifth Amendment, as well as Sections 144 and 455 of Title 28, United States Code?

3. Does the mootness rule apply to sales of non-bankruptcy estate property over which the Bankruptcy Court has assumed *in rem* jurisdiction in violation of the Due Process Clause of the Fifth Amendment?

LIST OF PARTIES

The parties to the proceedings below were petitioners Stacia Lee Sumwalt and David Randall Jenkins and the respondents Fred T. Boice (in his official capacity as trustee in bankruptcy), the Equity Securities-Holders' Committee, the University of Arizona and Hydro Geo Chem, Inc.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Stacia Lee Sumwalt ("Sumwalt") and David Randall Jenkins ("Jenkins"), respectfully request that a writ of certiorari issue to review the memorandum decision and order denying rehearing of the United States Court of Appeals for the Ninth Circuit, entered on March 2, 1992 and April 1, 1992.

DECISIONS AND ORDERS BELOW

The March 2, 1992 Memorandum Decision of the United States Court of Appeals for the Ninth Circuit is not a reported decision.. A copy of this Memorandum Decision is reproduced in Exhibit A of the Appendix at p. A-1, *infra*. The April 1, 1992 Order Denying Petition for Rehearing issued by the Ninth Circuit is also not a reported decision. A copy of this Order is reproduced in Exhibit A of the Appendix at p. A-5, *infra*.

The District Court's January 4, 1991 Judgment dismissing petitioners' appeals from the Bankruptcy Court as moot is not reported. A copy of the District Court's January 3, 1991 Civil Minutes and Order are reproduced in Exhibit A of the Appendix at p. A-6 and A-7, *infra*.

The Bankruptcy Court's September 6 and 17, 1992 and October 11 and 27, 1992 Orders granting the trustee's motion to assume Jenkins' and Sumwalt's interests in the right to use and renew the athletic tickets and confirming the auction sale of same to respondent Hydro Geo Chem, Inc. are not reported Orders. Copies of the foregoing Bankruptcy Court Orders are respectively reproduced in Exhibit A of the Appendix at pp. A-8, A-10, A-13, amd a-16, *infra*.

JURISDICTION

On September 17, 1987, Jenkins filed a petition for relief under Chapter 11 of Title 11, United States Code, in the United States Bankruptcy Court for the District of Arizona, Tucson Division. When the trustee in bankruptcy filed the subject contested matter, federal jurisdiction was allegedly invoked to determine whether either the Jenkins bankruptcy estate or Jenkins had the right to use and renew certain University of Arizona football and basketball athletic event tickets.

The Bankruptcy Court, *sua sponte*, ordered respondent Fred T. Boice ("Boice") to sue Jenkins to acquire Jenkins' interest in the right to use certain University of Arizona athletic event tickets for the 1990-1991 athletic season, and the right to renew the same for future athletic seasons for the benefit of the Jenkins bankruptcy estate.

Sumwalt is married to Jenkins, but is not a party to Jenkins' Chapter 11 proceeding. Sumwalt intervened in the proceedings below to protect her interest in the rights to use and renew the University of Arizona athletic event tickets.

On September 6 and 17, 1990, and again on October 11 and 27, 1990, the Bankruptcy Court entered several orders which approved Boice's motion to assume Jenkins' and Sumwalt's interest in the rights to use and renew the athletic tickets, which resulted in the sale of those rights to respondent Hydro Geo Chem, Inc.

On appeal from the foregoing Bankruptcy Court Orders, the United States District Court for the District of Arizona, Tucson Division, dismissed the appeal as moot on January 4, 1991 for Jenkins' and Sumwalt's failure to obtain a stay pending appeal and because Section 363(m) of Title 11, United States Code, disallows review in the absence of a stay. On appeal to the United States Court of Appeals for the Ninth Circuit, a Memorandum Decision was entered on March 2, 1992, wherein the court affirmed the District Court's dismissal on mootness grounds and held that the mootness rule forecloses review even in cases where the Bankruptcy Court's taking of property is flawed by substantive and procedural Constitutional Due Process violations.

Petitioners filed a petition for rehearing in the Ninth Circuit contending that the panel overlooked the requested relief that the proceeds of the sale be awarded to Petitioners under the facts and circumstances of the case, and that the Court of Appeals should consider the merits of the appeal since that relief was not disallowed by the mootness rule. On April 1, 1992, the Ninth Circuit denied rehearing.

This Court has jurisdiction to review the Ninth Circuit's Memorandum Decision and Order Denying Petition for Rehearing pursuant to Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Court's review of this Petition will necessarily involve consideration of Article I, §8, cl. 4 and the Fifth, Sixth and Seventh Amendments of the Constitution of the United States. Those constitutional provisions can be found in Exhibit B of the Appendix at pp. B-1, B-2, B-3 and B-4, *infra*.

The Court's review of this Petition also involves consideration of Section 363 of Title 11 and Sections 144, 455 and 1254 of Title 28, United States Code, which statutes are found in Exhibit B of the Appendix at pp. B-5, B-9, B-10 and B-13, *infra*.

STATEMENT OF THE CASE

Jenkins filed his Chapter 11 petition for relief on September 17, 1987. Boice was appointed as the trustee for the Jenkins bankruptcy estate by the Bankruptcy Court on September 23, 1987. Sumwalt, although married to Jenkins, is not a debtor in any bankruptcy proceeding.

On November 30, 1989, the Bankruptcy Court, *sua sponte*, ordered Boice to acquire Jenkins' interest in the right to use two University of Arizona football and basketball tickets and the right to renew the same for successive athletic seasons. On July 10, 1990, Boice filed his "Motion For Approval Of Assumption Of Executory Contract, And For Approval Of Assignment, At Public Auction, Of Property Of The Estate" (the "Trustee's Assumption Motion") in the Bankruptcy Court.

On August 13, 1990, Sumwalt, intervening to protect her interest, filed her "Opposition to Trustee's Motion To Assume Executory Contract; Motion For Determination Of Non-Core Proceeding And Bankruptcy Court Abstention" ("Sumwalt's Opposition"). Sumwalt demanded a jury trial pursuant to the Seventh Amendment of the United States Constitution. Also on August 13, 1990, Jenkins filed his "Opposition To Trustee's Motion To Assume Executory Contract; Motion For Determination Of Non-Core Proceeding And Bankruptcy Court Abstention" ("Jenkins' Opposition").

On September 5, 1990, Sumwalt filed her "Motion To Disqualify Bankruptcy Judge, Pursuant To 28 U.S.C. 144, From Particular Proceeding For Personal Bias And Prejudice" ("Sumwalt's Disqualification Motion") in the matter of the Trustee's Assumption Motion. Sumwalt's Disqualification Motion included a sworn affidavit and counsel's certificate of good faith.

During the September 6, 1990 hearing on the Trustee's Assumption Motion, the Bankruptcy Court heard oral argument from Boice, the Equity Securities-Holders' Committee, the University of Arizona and Jenkins, but postponed argument by counsel for Sumwalt until September 15, 1990 at 8:30 a.m. Prior to ruling on Sumwalt's Disqualification Motion and prior to the time set for allowing Sumwalt to argue her position through counsel, the Bankruptcy Court issued its September 6, 1990 Minute Entry Order, approving the Trustee's Assumption Motion. On September 15, 1990, counsel

for Sumwalt appeared before the Bankruptcy Court and argued Sumwalt's Disqualification Motion.

On September 17, 1990, the Bankruptcy Court issued its Minute Entry Order denying Sumwalt's Disqualification Motion and again ordered Boice's special counsel to file Findings of Fact and Conclusions of Law with the Bankruptcy Court and to serve the same on counsel for all interested parties within ten days.

The Bankruptcy Court issued another Minute Entry Order on October 11, 1990, referring to its September 6, 1990 Minute Entry Order as a final order and declaring that no appeal had been taken from that final order, even though it had ordered Boice to submit Findings of Fact and Conclusions of Law to support its Minute Entry Orders. As of October 11, 1990, Boice had not complied with the Bankruptcy Court's September 6 and 17, 1990 Orders.

The Bankruptcy Court ordered Boice to conduct a public auction on October 27, 1990 at 10:00 a.m. at the United States Bankruptcy Court, 110 S. Church, Courtroom 8212, Tucson, Arizona, and to advertise the auction in newspapers of general circulation in Tucson and Phoenix, and further ordered Jenkins' personal appearance at the auction, with instructions to bring all athletic event tickets in his possession.

On October 12, 1990, Jenkins filed a Motion to Disqualify the Bankruptcy Judge pursuant to Section 144 of Title 28, United States Code, based upon the Bankruptcy Judge's authorization of the trustee's application to plea bargain The JNC Companies ("JNC"), an Arizona corporation and co-debtor in the jointly administered bankruptcy proceedings. At the time the bankruptcy petitions were filed in September 1987, Jenkins owned two-thirds of JNC's outstanding stock and was JNC's controlling shareholder. Jenkins supplemented this motion with additional facts on December 5, 1990 and raised the Bankruptcy Judge's disqualification under Section 455 of Title 28, United States Code.[1]

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[1] The Ninth Circuit had previously held that since it was incumbent upon the judge to disqualify himself or herself under 28 U.S.C. §455, that issue could be raised for the first time on appeal. United States v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980). Therefore, in the instant case, it is immaterial whether the bankruptcy judge actually disqualified himself under Section 455 prior to confirming the sale.

Jenkins filed his Notice of Appeal in the Bankruptcy Court on October 19, 1990. Sumwalt filed her Notice of Appeal on October 22, 1990. Thereafter, Jenkins and Sumwalt requested an interlocutory stay pending appeal from the District Court.

On October 24, 1990, the District Court denied Sumwalt's Petition for Writ of Prohibition and denied Jenkins' and Sumwalt's Application for Interlocutory Stay of Proceedings pending review. Jenkins and Sumwalt then filed an "Emergency Petition for Writ of Mandamus Under Circuit Rule 27-3" in the Ninth Circuit. On October 26, 1990, the Ninth Circuit denied mandamus relief and then denied the application for an interlocutory stay as moot.

On October 27, 1990, the Bankruptcy Court confirmed the sale of the 1990-1991 athletic event tickets and the right to renew the same for subsequent athletic seasons to respondent Hydro Geo Chem, Inc.

On December 28, 1990, the Bankruptcy Judge denied Jenkins' October 12 and December 5, 1990 Motions to Disqualify, without notice and without a hearing.

On January 3, 1991, the District Court dismissed the pending appeal as moot, upon Boice's motion and prior to briefing and argument on the merits of the appeal. Jenkins and Sumwalt filed their Notice of Appeal to the Ninth Circuit on January 31, 1991.

The Ninth Circuit entered a Memorandum Decision on March 2, 1992 wherein it affirmed the District Court's dismissal on mootness grounds and held that the mootness rule does not allow review even where the Bankruptcy Court's position violated substantive and procedural Due Process.

Jenkins and Sumwalt filed a Petition for Rehearing in the Ninth Circuit, claiming that the panel overlooked their request for relief to award them the proceeds of the sale under the facts and circumstances of this case and to consider the merits of the appeal, since relief was not disallowed by the mootness rule. On April 1, 1992, the Ninth Circuit denied rehearing.

A. Facts Supporting Sumwalt's 28 U.S.C. §144 Motion To Disqualify The Bankruptcy Judge.

On or about November 30, 1989, the Bankruptcy Court, *sua sponte*, attempted to deprive Jenkins and/or Sumwalt of the right to use and renew the athletic event tickets after proclaiming--

> "THE COURT: Well, that's [sic] bring a little matter, you know, a little turnover or something and get the pot boiling because I don't think a bankrupt ought to be sitting in the first row of the basketball arena when the tickets are going for $5,000 a pop."
>
> Taped Transcript Of Proceedings Before The Honorable Lawrence Ollason United States Bankruptcy Court Judge, In re: The JNC Companies, Consolidated Case No. 87-02065-TUC-LO, November 30, 1989, p. 5, lines 2-6.

Jenkins gave sworn testimony on August 22, 1990 that he first learned of the remarks of the Bankruptcy Judge that, "... I don't think a bankrupt ought to be sitting in the first row of the basketball arena when the tickets are going for $5,000 a pop" during that deposition and immediately thereafter brought the remarks to Sumwalt's attention and caused a transcript of the November 30, 1989 hearing to be ordered from the court reporter.

The court reporter produced the transcript on or about Thursday, August 30, 1991. On September 5, 1990, counsel for Sumwalt, on behalf of Sumwalt, filed Sumwalt's Disqualification Motion in the matter of the Trustee's Assumption Motion. Sumwalt's Disqualification Motion included her sworn affidavit and the certificate of good faith of undersigned counsel for Sumwalt. Sumwalt claimed that the Bankruptcy Judge, sitting as a trier of fact, was personally biased and prejudiced concerning the seating of "bankrupt" people at the basketball arena and could not fairly or impartially adjudicate the matter before him since he had formed an opinion regarding Jenkins' right to sit in designated areas in the basketball arena, prior to hearing any evidence or testimony and prior to a trial on the merits.

B. Facts Surrounding The Bankruptcy Judge's Participation In The Scheme To Plea Bargain JNC And The Basis For His Disqualification Under 28 U.S.C. §455(a).

On or about November 29, 1989, Boice filed a "Notice Of Hearing On Trustee's Application For Authority To Enter Into Plea Agreement With State Of Arizona" in the Bankruptcy Court (the "Trustee's Plea Agreement Application"). Boice sought the Bankruptcy Court's approval to enter a *nolo contendere* plea, on behalf of JNC, to one count of selling securities in violation of A.R.S. §44-1841, in parallel state criminal proceedings. Jenkins and Sumwalt were and are criminal defendants for the same charges in the same criminal proceeding.

On or about December 22, 1989, Jenkins and JNC filed their objection to Boice's Plea Agreement Application in the Bankruptcy Court. In their opposition, Jenkins and JNC raised the issue that this Court's holding in *Younger v. Harris*, 401 U.S. 37 (1971), precluded the Bankruptcy Court from interfering in ongoing state criminal proceedings in the absence of a finding that the state criminal proceedings had either (a) been undertaken in bad faith, (b) been undertaken to harass the criminal defendants therein or, (c) for other exceptional circumstances.

On December 28, 1989, prior to the presentation of any evidence or a trial on the merits, the Bankruptcy Judge authorized the Trustee's Plea Agreement Application. Thereafter, Boice acting on the Bankruptcy Judge's authorization, appeared in the state criminal proceedings to plea bargain JNC.

On August 16, 1990, the Arizona Court of Appeals, on the basis of *Younger*, held that the Bankruptcy Court lacked jurisdiction to interfere in the state criminal proceedings and that Boice had an irreconcilable conflict of interest in representing JNC in the state criminal proceedings. See *JNC Companies v. Meehan*, 165 Ariz. 144, 797 P.2d 1 (Ariz.App. 1990), a copy of which has been reproduced in Exhibit C of the Appendix at p. C-1, *infra*.

C. Facts Supporting Petitioners' Claim That The Jenkins Bankruptcy Estate Had No Cognizable Property Interest In The Rights To The Disputed Athletic Event Tickets.

At the time Jenkins filed for bankruptcy protection in September 1987, he held the right to use and renew University of Arizona basketball season tickets Section 5, Row 4, Seats 1 and 2; and, University of Arizona football season tickets Section 104, Row 44, Seats 20 and 21. To maintain the right to use and renew the above athletic tickets the University of Arizona requires three kinds of payments for each athletic season: (1) the purchase price (which varies each year) for each basketball ticket, (2) the purchase price (which varies each year) for each football ticket, and (3) FIVE HUNDRED DOLLARS ($500.00) per seat mandatory donation payment for each of the greater of either the number of football tickets purchased or the number of basketball tickets purchased for any given athletic season.

Since the filing of the Jenkins Chapter 11 petition in September 1987, Sumwalt has used her separate property to pay for the donation requirement and athletic event tickets used personally by Jenkins and her, or has received payment from others for the athletic event tickets on Jenkins' and her behalf, in exchange for Jenkins' contractual agreement that in the event of his death or their divorce such rights to use and renew the athletic tickets would be transferred, assigned and/or conveyed to Sumwalt.

The sole controversy before the Bankruptcy Court involved the right to use the remaining University of Arizona football and basketball tickets for the 1990-1991 athletic season and the right to renew them for the 1991-1992 athletic season.

Had Jenkins and/or Sumwalt failed to either purchase, or have purchased on their behalf, the University of Arizona athletic event tickets for the 1987-1988 season for the athletic event seats assigned to Jenkins, neither Jenkins nor Sumwalt would have retained the right to renew those athletic event tickets and assigned seats for the 1988-1989 season. In the spring of 1988, Boice told Jenkins that the rights to use and renew the athletic event tickets were not an asset of the Jenkins bankruptcy estate and, as a result, Boice had no jurisdiction over the tickets or any interest in them, and the tickets

were Jenkins' to do with as he wanted. The Bankruptcy Court has neither approved nor disapproved of Boice's rejection of interest in the rights to use and renew the athletic event tickets on behalf of the Jenkins bankruptcy estate.

Had Jenkins and/or Sumwalt failed to make the donation requirement in May 1988 for the 1988-1989 athletic season, the University of Arizona would have reassigned Jenkins' athletic event tickets to a third party. Boice, in his capacity as trustee in bankruptcy for the Jenkins bankruptcy estate, never made any payments (either for the donation requirement or athletic event tickets) to the University of Arizona for the right to use and renew the athletic event tickets for the 1988-89 athletic season.

Had Jenkins and/or Sumwalt failed to make the donation requirement for the athletic event tickets for the 1989-1990 athletic season on or about May 1989, the University of Arizona would have reassigned Jenkins' athletic event tickets to a third party. Boice has admitted to never having paid any monies for the donation requirement or for the disputed athletic event tickets for any athletic season, in the three-year period between the time Jenkins filed for relief under Chapter 11 of the Bankruptcy Code in September 1987 and the time the Bankruptcy Court confirmed the auction sale of the rights to use and renew the disputed athletic tickets to respondent Hydro Geo Chem, Inc. in October 1990.

REASONS FOR GRANTING THE WRIT

I.

In codifying the mootness rule in Section 363(m) of Title 11, United States Code, Congress did not clearly intend to preclude appellate review of colorable Constitutional claims in cases where the Bankruptcy Court's taking of property involved substantive and procedural Constitutional Due Process violations.

The Ninth Circuit affirmed the District Court's dismissal for mootness, holding that it saw no "reason to adopt a new general exception to the mootness rule for all cases in which sale of

property is challenged on constitutional grounds." In denying sanctions against Petitioners, the Ninth Circuit criticized Petitioners' claims that the substantive and procedural Constitutional Due Process violations in the proceedings before the Bankruptcy Court were not disallowed by the mootness rule, as "exceedingly close to the border that separates the very imaginative from the frivolous."

The Ninth Circuit's holding in the instant case is not supported by applicable law. This Court's prior decisions hold that Congress cannot, pursuant to the Bankruptcy Clause, Article I, §8, cl. 4 of the Constitution of the United States, deny, or render inapplicable, rights guaranteed by the Due Process Clause of the Fifth Amendment. See, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589-90 (1935); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

This Court has repeatedly noted that, "The point is straightforward: the Due Process clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to *constitutionally* adequate procedures." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (*Loudermill*) (emphasis added). No decisions of this Court have abrogated the foregoing proposition.

Congress recognized the Fifth Amendment's due process constraints by requiring that a sale by a trustee in bankruptcy proceedings may only be approved after proper notice and a hearing. 11 U.S.C. §363(b)(1). As a result, any argument that Congress clearly intended to forego appellate review of colorable Constitutional claims is negated by Congressional recognition of certain fundamental Due Process requirements.

The Ninth Circuit recognizes that violations of the Due Process notice requirements abrogate mootness claims on appellate review. See, *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448-1451 (9th Cir. 1985); *In re Blumer*, 826 F.2d 1069 (9th Cir. 1987) (Table), *aff'g*, 66 B.R. 109, 113-115 (9thCir.BAP 1986). Moreover, the Ninth Circuit panel in the instant case favorably cited a lower court's decision holding that the mootness rule is inapplicable in situations involving improper notice. See, *In re Moberg Trucking, Inc.*, 112 B.R. 362, 363-364 (9thCir.BAP 1990).

Nothing in Section 363 suggests that Congress intended to limit appellate review only to claims of improper notice. Further,

nothing in Section 363 excludes the application of other federal law in cases involving the mootness rule. Accordingly, the notice and hearing requirements of Section 363(m) must be read to include a hearing before a Bankruptcy Judge not otherwise disqualified by either Sections 144 or 455 of Title 28, United States Code; and *in rem* jurisdiction.

In *Webster v. Doe*, 486 U.S. 592, 603 (1988), the Court held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." While the instant case involves the question of whether the mootness rule disallows appellate review of Constitutional claims in the absence of a stay, the same standard must apply.

The Ninth Circuit's memorandum decision in this case (i) is at odds with this Court's prior decisions holding that Congress cannot deny rights guaranteed by the Due Process Clause of the Fifth Amendment, (ii) is at odds with Congress's clear intent to accord Due Process in cases invoking the mootness rule, (iii) is at odds with prior Ninth Circuit precedent, and (iv) is at odds with this Court's prior holdings that Congress must speak clearly if it intends to preclude appellate review of Constitutional claims. Because the Petitioners' rights to substantive and procedural Due Process in the instant case were violated by the Bankruptcy Court in its taking of their property, and because other bankruptcy debtors may suffer similar deprivations without a clear understanding that such colorable Constitutional claims may be reviewed in the absence of a stay pending appeal, it is essential that the Court give this matter serious consideration.

II.

The mootness rule does not apply to sales approved by a Bankruptcy judge disqualified pursuant to the Due Process Clause of the Fifth Amendment, 28 U.S.C. §144 and/or 28 U.S.C. §455.

By holding that the mootness rule precludes appellate review of colorable Constitutional claims, the Ninth Circuit has failed to protect Petitioners from the taking of their property by a Bankruptcy Judge disqualified under the Due Process Clause of the

Fifth Amendment, 28 U.S.C. §144 and/or 28 U.S.C. §455. This raises the question whether the mootness rule precludes appellate review in cases where a Bankruptcy Judge's refusal to disqualify ignores the Due Process Clause of the Fifth Amendment.

It is clear that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Peters v. Kiff*, 407 U.S. 493, 501 (1972); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 551 (1976).

More recently, this Court has held that the right to a "neutral and detached judge" in all proceedings, is protected by the United States Constitution. *Ward v. City of Monroeville*, 409 U.S. 57, 61-62 (1972); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) ("powerful" constitutional interest in fair adjudicative procedure). Also see, Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 457 (1986) (independent adjudicator necessary to satisfy due process requirements). Moreover, this Court has held that where the express statutory standard has been violated and a disqualified judge has sat on the case, the judge's rulings are to be vacated on appeal. *William Cramp and Sons Ship and Engine Building Co. v. International Curtiss-Machine Turbine Co.*, 228 U.S. 645, 649-652 (1913) (the court of appeals passing on the case was virtually no court at all because it was not organized in conformity to law).

This Court has held that not all cases involving judicial disqualification negate the Due Process Clause of the Fifth Amendment. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 820-821 (1986). As demonstrated *infra*, the Bankruptcy Judge's refusal to disqualify for the reasons cited in the instant case denies the protection of the Due Process Clause of the Fifth Amendment.

A. <u>The Bankruptcy Judge's Pre-Determination That A Bankrupt Should Not Sit In The Front Row Of The Basketball Arena Disqualified Him As A Trier Of Fact</u>.

As demonstrated *supra*, the right to a fair, impartial, neutral and detached tribunal is an essential element to Due Process under the Fifth Amendment. In the instant case, the Bankruptcy Judge expressed the opinion, in open court, that a bankrupt should not

be sitting in the front row of the basketball arena when tickets were going for "$5,000 a pop." Thereupon, the Bankruptcy Judge ordered the trustee to bring action against Jenkins to obtain the right to use and renew Jenkins' athletic event tickets, which rights the trustee had previously abandoned.

The Bankruptcy Judge knew, at the time he expressed his opinion, that he would be the trier of fact, weigh all the evidence and determine the credibility of any testimony in the matter. The Bankruptcy Judge's pre-determination that it was not appropriate for a bankrupt to sit in certain areas in the basketball arena would lead a reasonable person to anticipate that his factual and legal conclusions would support his personal view and that the scales of justice would be tipped, *ex ante*, in favor of separating Jenkins from his right to use and renew the athletic event tickets.

The Ninth Circuit has ruled that where a judge also sits as a trier of fact, his or her disqualification would be measured against disqualification standards imposed to assure an impartial jury. *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989) (*Van Griffin*) Thus, it is appropriate to compare the Bankruptcy Judge's disqualification in the instant case with standards imposed upon jurors. The *Van Griffin* Ninth Circuit panel held that the *Van Griffin* magistrate, sitting as a trier of fact, was disqualified as a result of his keeping an *ex parte* communication in his possession during the trial. *Van Griffin*, 874 F.2d at 637. The *Van Griffin* Panel reasoned that had a jury received such an *ex parte* communication, the verdict would have been tainted. *Id.*

A civil litigant's right to an impartial jury is contained both in the Seventh Amendment's preservation of a "right to trial by jury" and the Fifth Amendment's guarantee of due process. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 n. 4 (4th Cir. 1986). In the instant case, Sumwalt was not only denied her Seventh Amendment right to a jury trial, but was also denied a trial by an impartial fact finder.

B. The Bankruptcy Judge's Authorization To Plea Bargain JNC To A Felony Conviction In Ongoing State Criminal Proceedings Comprises Bias And Prejudice Offensive To The Due Process Clause.

The Bankruptcy Judge's authorizing the trustee to plea bargain the closely-related debtor corporation in state criminal proceedings mandates his disqualification under Section 455(a) of Title 28, United States Code, since a reasonable man would question the judge's impartiality for condemning the debtor corporation to a felony conviction prior to receiving evidence and prior to a trial on the merits. The Arizona Court of Appeals held that the Bankruptcy Judge, in the absence of jurisdiction, interfered in the state criminal proceedings. *JNC Companies v. Meehan*, 165 Ariz. 144, 797 P.2d 1 (Ariz.App. 1990).

If a juror was anything but indifferent about the guilt of an accused in advance of presentation of evidence at trial, that juror would be disqualified. *Irvin v. Dowd*, 366 U.S. 717, 721-722, (1961). The Bankruptcy Judge, over the objection of Jenkins and JNC and notwithstanding the *Younger* doctrine, found that it had jurisdiction to condemn JNC to a state criminal felony conviction in violation of JNC's Sixth Amendment right to counsel of its choice and JNC's Sixth Amendment right to trial by jury. See, *JNC Companies v. Meehan, supra*. By doing so, the Bankruptcy Judge exhibited his pre-determination of JNC's guilt without a trial and in the complete absence of evidence.[2]

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[2] On May 13, 1991, the Honorable Robert D. Myers, a judge of the Superior Court of the State of Arizona in and for the County of Maricopa (Phoenix), found that it was in the best interests of the State and JNC that all criminal charges against JNC be dismissed with prejudice and, as a result, entered its final order accordingly. On that same day, JNC filed a Bivens action against the bankruptcy judge in his individual capacity. See, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). That civil action was dismissed with prejudice by the district court on absolute immunity grounds and is now on appeal in the Ninth Circuit.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977), this Court held that a judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in that direction. *Id* (emphasis added); citing, *Sparf & Hansen v. United States*, 156 U.S. 51 (1895); *Carpenters v. United States*, 330 U.S. 395, 408 (1947). The judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused. *Id.* (Emphasis added). Accordingly, the Bankruptcy Judge was prohibited and barred by this Court from authorizing JNC's felony conviction in the state criminal proceedings.

Based on the foregoing, the Bankruptcy Judge, as trier of fact, should have been disqualified from proceeding in bankruptcy case number 87-02065-TUC-LO. *Irvin v. Dowd, supra; Van Griffin, supra.* The Bankruptcy Judge's failure to grant the Petitioners' disqualification motions and his failure to disqualify himself on his own motion violates the Due Process Clause of the Fifth Amendment. Accordingly, the Court should grant review of this issue.

III.

The mootness rule does not apply to sales of non-bankruptcy estate property over which the Bankruptcy Court has improperly acquired *in rem* jurisdiction.

By holding that the mootness rule precludes appellate review of colorable Constitutional claims the Ninth Circuit has failed to protect Petitioners from the taking of their property by a Bankruptcy Court that lacked jurisdiction over the *res*. Jenkins filed for protection under Chapter 11 of the Bankruptcy Code in September 1987, at a time when he possessed the rights to use the 1987-1988 football and basketball tickets and possessed the right to renew those tickets for the next athletic season. As demonstrated *supra*, had Jenkins failed to renew the right to use the athletic event tickets for the next athletic season by paying the University of Arizona the required donation premium and the ticket prices for the football and basketball tickets, his right to use the 1988-1989 athletic tickets and the right to renew the same for the 1989-1990 athletic season would

have lapsed by the terms of the agreement with the University of Arizona, and those rights would have been reallocated to third parties.

As a result, any interest the Jenkins bankruptcy estate had in the rights to use and renew the athletic event tickets lapsed in May 1988 when the Jenkins bankruptcy estate failed to pay the donation premium and the ticket price for the 1988-1989 athletic season. This occurred after Boice told Jenkins that the bankruptcy estate had no interest in the tickets.

Boice's failure to make any payments on behalf of the Jenkins bankruptcy estate was not limited to only one athletic season (between the time Jenkins filed for Chapter 11 relief in September 1987 and the time the Bankruptcy Court confirmed the auction sale to respondent Hydro Geo Chem, Inc. in October 1990), but to three athletic seasons. As a result, at the time the Bankruptcy Court ordered Boice to file an action against Jenkins to acquire the basketball tickets, the Jenkins bankruptcy estate no longer had any cognizable interest in the right to use and renew the disputed athletic event tickets.

Notwithstanding its own decisional law, the Ninth Circuit failed to protect Jenkins and Sumwalt from the Bankruptcy Court's deprivation of their right to use and renew the athletic event tickets even though the Jenkins bankruptcy estate's interest therein had lapsed on or about May 1988 and the Bankruptcy Court lost any and all jurisdiction over those rights at that time. The Ninth Circuit has held that the provision of Bankruptcy Code Section 365(a), governing executory contracts and unexpired leases, is inapplicable to executory contracts and leases executed post-petition. *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988). It is clear that the rights in controversy in the Bankruptcy Court involved the right to use the 1990-1991 football and basketball athletic tickets and the right to renew the same for the 1991-1992 athletic season. It is clear that these rights were post-petition in that nearly three years and three complete athletic seasons has passed between the Jenkins' filing the Chapter 11 petition and the time periods relating to the foregoing rights.

It would be foolish for Boice to acquire the rights to use the football and basketball athletic event tickets for the 1987-1988 athletic season and the right to renew the same for the 1988-1989 athletic season in July 1990, since there would be no takers. Boice

did not produce any evidence to support the proposition that the rights he assumed were not post-petition. Thus, it is clear that since Boice allowed any interest in the athletic event tickets to lapse in May 1988 when he failed to cause the estate to pay the donation premium and buy the athletic tickets for the 1988-1989 athletic season and also the right to use the 1990-1991 athletic tickets, the Bankruptcy Court lacked *in rem* jurisdiction to challenge Petitioners' rights to use and renew the 1990-1991 athletic event tickets.

The lower courts have uniformly held that the Bankruptcy Code does not create or enhance property rights of a debtor. *In re Gull Air, Inc.*, 890 F.2d 1255, 1261 (1st Cir. 1989); *citing, Moody v. Amoco Oil Company*, 734 F.2d 1200, 1213 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984); *In re Advent Corp.*, 24 B.R. 612, 614, (Bkrtcy. 1st Cir. 1982); *United States v. Professional Sales Corp.*, 56 B.R. 753, 764 (Bkrtcy.N.D.Ill. 1985); *Shell Oil Company v. Anne Cara Oil Co., Inc.*, 32 B.R. 643, 647-48 (Bkrtcy.D.Mass. 1983); *D. H. Overmyer Telecasting Co., Inc. v. Lake Erie Communications, Inc.*, 35 B.R. 400, 404 (Bkrtcy.N.D.Ohio 1983). Thus, when a debtor's proprietary interest expires by operation of an express condition, the Bankruptcy Code does not preserve that interest and prevent termination. *Id; citing, Good Hope Refineries, Inc. v. Benavides*, 602 F.2d 998, 1001-03 (1st Cir.), *cert. denied*, 444 U.S. 992 (1979); *In re P.I.N.E., Inc.*, 52 B.R. 463, 470 (Bkrtcy.W.D.Mich. 1985); *In re Crabb*, 48 B.R. 165, 167 (Bkrtcy.D.Mass. 1985) (*Crabb*).

Once an executory contract is terminated there is nothing for the trustee in bankruptcy to assume. See *Crabb, supra*. That is, there was no executory contract for the trustee in bankruptcy to assume when the executory contract expired by its express terms and conditions prior to the trustee's exercise of any option to extend it. *Id.* The Bankruptcy Code neither enlarges the rights of a trustee in bankruptcy under an executory contract nor prevents termination of an executory contract by its own terms. *Id.* The Bankruptcy Code's automatic stay provisions do not stop the clock on provisions of contractual agreements. *Id.* The courts will not revive a terminated executory contract simply because of the contract's importance to reorganization efforts. *Id.*

Any argument that 11 U.S.C. §108(b) supports the Trustee's Assumption Motion is misplaced. Bankruptcy Code

Section 108(b) extends the time for the trustee in bankruptcy to file an action to assume the executory contract to the later of its natural expiration term or 60 days from the order of relief. See, *In re Santa Fe Development and Mortgage Corporation*, 16 B.R. 165 (9thCir-BAP 1981).

In the instant case, the order of relief was entered on or about September 1987. The natural expiration term of the alleged executory contract for the athletic event tickets was approximately May 1988 when Boice failed to cause the Jenkins bankruptcy estate to pay the donation premium and purchase the football and basketball tickets for the 1988-1989 athletic season. At that time, any obligation the University of Arizona may have owed the Jenkins bankruptcy estate to perform under the terms and conditions of the 1987-1988 athletic season executory contract (the executory contract in effect at the time the Jenkins Chapter 11 petition was filed) terminated. Therefore, Bankruptcy Code Section 108(b) would not operate to extend the time to file a motion to assume the executory contract past its natural expiration date of May 1988.

In the instant case, any right the Jenkins bankruptcy estate had to assume the alleged executory contract to use and renew the aforedescribed athletic event tickets lapsed and/or expired in May 1988 upon Boice's failure to renew the Jenkins bankruptcy estate's right to purchase the athletic event tickets by failing to pay the May 1988 donation premium. Boice, as a matter of law, cannot revive the Jenkins bankruptcy estate's right to use and renew the athletic tickets for the reason that he, as trustee in bankruptcy, allowed that right to lapse and/or expire on or about May 1988.

During a hearing before the District Court on Wednesday, October 24, 1990, Boice's counsel admitted that Boice had told Jenkins in the spring of 1988 that the Jenkins bankruptcy estate had no interest in the disputed athletic event tickets and that such tickets were Jenkins' to do with as he wished. The sole argument of Boice's counsel before the District Court on October 24, 1990 was that Boice's promise was not binding on the Jenkins bankruptcy estate since the Bankruptcy Court never authorized the rejection. However, the requirement of the Bankruptcy Court's approval of Boice's rejection, as a matter of law, became moot once Boice failed to pay the donation premium in May 1988 on behalf of the Jenkins bankruptcy estate.

In an analogous situation, the Ninth Circuit held that approval of a rejection by the trustee in bankruptcy of a non-residential lease became moot once the statutory rejection provisions of 11 U.S.C. §365(d)(4) became effective. The Ninth Circuit concluded that once the lease had been rejected as a matter of law, the Bankruptcy Court's approval of the trustee's rejection became moot. See, *In re Arizona Appetito's Stores, Inc.*, 893 F.2d 216, 219 (9th Cir. 1990).

The Bankruptcy Court's jurisdiction does not follow a debtor's property, but lapses when the property leaves the debtor's estate. *In the Matter of Xonics, Inc.*, 813 F.2d 127 (7th Cir. 1987). Thus, when the Jenkins bankruptcy estate's interest in the athletic tickets lapsed on or about May 1988, the Bankruptcy Court lost *in rem* jurisdiction over the rights to use and renew the athletic event tickets. Accordingly, the Bankruptcy Court's assumption of jurisdiction over Petitioners' rights to use and renew the athletic event tickets violated rights guaranteed to the Petitioners by the Due Process Clause of the Fifth Amendment. These rights include the right to be free from the deprivation of property at the hands of a court lacking *in rem* jurisdiction. The mootness rule cannot protect a court's unconstitutional taking of property when it lacks *in rem* jurisdiction.

CONCLUSION

For the above reasons, this Petition for Certiorari should be granted. If the Petitioners are correct in urging that the mootness rule does not preclude review of colorable Constitutional claims, then the Court should address the merits of the two remaining issues. Upon determining that the Petitioners were wrongfully deprived of their rights to use and renew the disputed athletic tickets, the Court should remand these proceedings to the Bankruptcy Court, directing it to replace the disqualified Bankruptcy Judge, to grant Petitioners the right to renew the athletic event tickets for the next athletic season, and to conduct an evidentiary hearing to determine the appropriate

amount of damages to be paid to Petitioners for the unlawful deprivation of their rights to use the remaining 1990-1991 athletic event tickets.

Respectfully submitted,

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Counsel for Petitioners

FILED
MAR 2 1992
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STACIA LEE SUMWALT; DAVID RANDALL JENKINS,	No. 91-15280
Appellants,	D.C. No. CIV-90-00723-WDB
v.	MEMORANDUM*
EQUITY SECURITIES; UNIVERSITY OF ARIZONA; GREG M. OESTER,	
Appellees,	
FRED T. BOICE, in his official capacity as trustee in bankruptcy,	
Trustee-Appellee.	

Appeal from the United States District
Court for the District of Arizona
William D. Browning, District Judge,
Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except a provided by 9th Cir. R. 36-3.

Submitted February 10, 1992**
San Francisco, California

Before: FLETCHER, D.W. NELSON, and
FERNANDEZ, Circuit Judges

Stacia Sumwalt (Sumwalt) and her husband David Randall Jenkins (Jenkins) appeal the district court's dismissal of their bankruptcy appeal as moot. Appellants seek to challenge a bankruptcy court order approving the sale of their University of Arizona football and basketball tickets. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns athletic tickets that, according to appellants, are "virtually irreplaceable and are highly coveted in the Tucson community." Bankruptcy Court Judge Lawrence Ollason, who oversees Jenkins' Chapter 11 case, believed that a bankrupt should be "be sitting in the first row of the basketball arena when the tickets are going for $5,000 a pop" and ordered the trustee to sell the tickets at auction.

Sumwalt and Jenkins vigorously opposed this sale. Sumwalt sought to disqualify the bankruptcy judge for personal bias and prejudice based on the above remark and petitioned the district court for a writ of prohibition to stop the sale. Jenkins also filed a motion to disqualify Judge Ollason for bias, and moved the district court to withdraw its reference to the bankruptcy court. Sumwalt and Jenkins appealed the bankruptcy court order authorizing the sale and applied for a stay from the District Court pending review. When the stay and the writ of prohibition were denied, Sumwalt and Jenkins sought emergency mandamus relief from this court, which was also denied. The tickets were sold at public auction to Hydro Geo Chem, Inc. for $11,000. The district court subsequently dismissed as moot the appeal challenging the sale.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

STANDARD REVIEW

The existence of subject matter jurisdiction is reviewed de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, _ U.S. _, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990).

DISCUSSION

A. Dismissal as Moot.

Under 11 U.S.C. § 363(m), the bankruptcy trustee's sale of property to a good faith purchaser cannot be invalidated on appeal unless the sale was stayed pending appeal. 11 U.S.C. § 363(m). When the debtor fails to obtain a stay, we have consistently held that the mootness rule precludes a subsequent challenge to the sale of property. In re Mann, 907 F.2d 923, 926-28 (9th Cir. 1990); In re Onouli-Kona Land Co., 846 F.2d 1170, 1172-74 (9th Cir. 1988); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423 (9th Cir. 1985). The mootness rule does not apply to cases involving real property subject to a statutory right of redemption where the purchaser is party to the appeal, nor to cases where the purchaser acts in bad faith. In re Onouli-Kona Land Co., 846 F.2d at 1173. The mootness rule also does not apply if the purchaser's interest was expressly conditioned upon the outcome of the appeal. In re CADA Inv., 664 F.2d 1158, 1160 (9th Cir. 1981).

In addition to these exceptions, the Bankruptcy Appellate Panel held in In re Moberg Trucking Inc., 112 B.R. 362, 363 (Bankr. 9th Cir. 1990) that the mootness rule is not applicable "when the Appellant seeks to attach the § 363 sale of estate property on the grounds of improper notice." However, in Moberg the panel declared that in order to void the sale based upon lack of notice, an aggrieved party would have to "commence an adversary proceeding wherein all parties in interest could be joined, in particular, the third party purchaser." Id.

None of these exceptions to the mootness rule applies to the present case. Nor do we see any reason to adopt a new general

exception to the mootness rule for all cases in which sale of property is challenged on constitutional grounds. According to the appellants, Judge Ollason's failure to disqualify himself and his failure to rule whether the ticket sale was a core or non-core matter violated their due process rights. As this appeal demonstrates, the general exception proposed by the appellants could easily swallow the rule; virtually any dispute could be clothes in constitutional dress.

The district court properly dismissed the appeal as moot.[1]

B. Sanctions on Appeal.

The appellee requests that the appellants be sanctioned for filing a frivolous appeal. See Fed. R. App. P. 38. "An appeal is frivolous when the result is obvious or the appellants' arguments are wholly without merit." Bell v. City of Kellogg, 922 F.2d 1418, 1425 (9th Cir. 1991). While this case is exceedingly close to the border that separates the very imaginative from the frivolous, we have determined that sanctions are not appropriate, and we decline to award them.

AFFIRMED.

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[1]This court lacks jurisdiction to consider Judge Ollason's failure to recuse himself because this decision was not a final, appealable order, nor did it have any bearing on a final, appealable order. In re Horton, 621 F.2d 968, 970 (9th Cir. 1980); Thomassen v. United States, 835 F.2d 727, 732 n.3 (1987).

FILED
APR 1 1992
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STACIA LEE SUMWALT; DAVID RANDALL JENKINS,	No. 91-15280
Appellants,	D.C. No. CIV-90-00723-WDB
v.	ORDER DENYING
EQUITY SECURITIES; UNIVERSITY OF ARIZONA; GREG M. OESTER,	PETITION FOR REHEARING
Appellees,	
FRED T. BOICE, in his official capacity as trustee in bankruptcy,	
Trustee-Appellee.	

Before: D.W. NELSON, FLETCHER, and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. The petition for rehearing is accordingly DENIED.

United States District Court
for the District of Arizona
January 3, 1991

Civil Minutes - General
Case No. 1:90-cv-00723 - 4:90-cv-00724
Title: Sumwalt v. Equity Securities

HON. WILLIAM D. BROWNING, PRESIDING
PATRICIA MORENO, DEPUTY CLERK
RHONDA BODIMER, COURT REPORTER

ATTYS PRESENT: Jack Rappeport ; Donald Gabriel ; Susan Boswell

DOCKET ENTRY - HEARING ON MOTION TO DISMISS

The Court finds the motion to join indispensable ptys by David Randall Jenkins in 4:90-cv-00723 [9-1] moot.

ORDER granting motion dismiss appeal filed by David Jenkins by appellee Fred T Boice in 4:90-cv-00723 [6-1]

ORDER dismissing the BANKRUPTCY APPEAL in 4:90-cv-00723

(cc: all counsel)

CASE ASSIGNED TO:
Hon. William D. Browning, Judge

FILED
JAN 4 1991

UNITED STATES DISTRICT COURT
_____DISTRICT OF ARIZONA

STACIA SUMWALT, et al.

JUDGMENT IN A CIVIL CASE

v.

EQUITY SECURITIES, etc.

CASE NUMBER:
CIV-90-723-WDB
(CIV-90-724-T-WDB)

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the motion to dismiss appeal is GRANTED,

IT IS FURTHER ORDERED the bankruptcy appeal is DISMISSED.

January 3, 1991
RICHARD H. WEARE
Deputy Clerk

By /s/_____
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	) Chapter 11
	)
JNC COMPANIES	) No. 87-02065-
	) TUC-LO
	) Consolidated Cases
Debtor.	)
	) MINUTE ENTRY ORDER

Fred T. Boice, trustee in the captioned consolidated cases, filed a "Motion for Approval of Assumption of Executory Contract, and for Approval of Assignment, at Public Auction, of Property of the Estate." The property consists of two University of Arizona season basketball tickets and two University of Arizona season football tickets, with concomitant rights of renewal. The trustee's motion was opposed on various grounds by the Arizona Board of Regents on behalf of the University of Arizona's Department of Intercollegiate Athletics, David Randall Jenkins and Stacia Lee Sumwalt.

The motion was argued September 6, 1990, and thereafter was taken under advisement. Upon consideration of the pleadings submitted and the arguments presented,

IT IS ORDERED granting the trustee's motion.

IT IS FURTHER ORDERED directing special counsel for the trustee to prepare findings of fact and conclusions of law, to be filed with the Court and served on counsel for all interested parties within ten days from the date hereof.

DATED AT TUCSON, ARIZONA this 6 of September, 1990.

/s/
LAWRENCE OLLASON
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this 6 day of September, 1990, to:

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United States Trustee
320 N. Central, Suite 100
Phoenix, Arizona 85004

Deputy Clerk
(sm)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11
	)	
THE JNC COMPANIES	)	No. 87-02065-TUC-LO
	)	Consolidated Cases
Debtor.	)	
	)	MINUTE ENTRY ORDER

Stacia Lee Sumwalt ("Sumwalt"), the non-debtor spouse of debtor David Randall Jenkins, filed a "Motion to Disquality Bankruptcy Judge, Pursuant to 28 Us.C. §144, from Particular Proceeding for Personal Bias and Prejudice" and an "Ex Parte Application For Interlocutory Stay of Proceedings." Both the motion and application were opposed by Fred T. Boice ("Boice" or "trustee"), the trustee in these consolidated cases. The trustee also filed a "Motion to Strike Pleadings Filed By Or On Behalf of Stacia Lee Sumwalt." In addition, Sumwalt filed a "Petition for Writ of Prohibition And/Or Mandamus And/Or Other Extraordinary Relief" in the United States District Court for the District of Arizona, and Boice filed a response thereto.

This flurry of activity was precipitated by the trustee's "Motion For Approval of Assumption of Executory Contract, and For Approval Of Assignment, At Public Auction, Of Property Of The Estate," in which the trustee sought court approval to assume certain executory contracts and to assign his rights under the contracts. The subject matter of the contracts consists of two University of Arizona season basketball tickets and two University of Arizona season football tickets, with concomitant rights of renewal. After a hearing onthe trustee's motion to assume, the Court entered a Minute Entry Order granting the motion.

Sumwalt's motion and application, and the opposition filed in response, came on for hearing on September 15, 1990, at which time Sumwalt was represented by counsel but was not personally present. The Court, after consideration of the pleadings submitted and the arguments presented, finds that assuming arguendo Sumwalt does not have standing, the facts pleaded in her motion

to disqualify fail to state a legally sufficient basis for recusal and do not warrant disqualification.

Based on the foregoing and grounds therefore appearing,

IT IS ORDERED denying Sumwalt's motion to disualify.

IT IS FURTHER ORDERED denying Sumwalt's ex parte application for an interlocutory stay.

IT IS FURTHER ORDRED denying the trustee's motion to strike Sumwalt's pleadings.

IT IS FURTHER ORDERED directing special counsel for the trustee to prepare findings of fact and conclusions of law, to be filed with the Court and served on counsel for all interested parties within ten days from the date hereof.

DATED AT TUCSON, ARIZONA this 17 of September, 1990.

/s/
LAWRENCE OLLASON
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this 17 day of September, 1990, to:

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(sm)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	) Chapter 11
	)
THE JNC COMPANIES	) No. 87-02065-
	) TUC-LO
	) Consolidated Cases
Debtor.	)
	) MINUTE ENTRY ORDER

The Court, by Order dated September 6, 1990[1], approved the trustee's motion to assume certain executory contracts and assign the estate's interest in those contracts. The subject matter of the contracts consists of two Univesity of Arizona season basketball tickets and two University of Arizona season football tickets, with concomitant rights of renewal, including any rights to priority seating.

IT IS ORDERED that the following procedures will govern the assignment:

1. The trustee shall conduct a public auction on Saturday, October 27, 1990, at 10:00 a.m., at the United States Bankruptcy Court, 110 S. Church, Courtroom 8212, Tucson, Arizona.

2. The trustee shall advertise promptly the date and time set for the auction, and shall include a description of the property, in newspapers of general circulation in Tucson and Phoenix and in any other areas of the state deemed appropriate after consultation with the University of Arizona Department of Intercollegiate Athletics.

3. The trustee additionally shall give notice of the auction to all parties known to claim an interest in the property.

4. The property shall be auctioned as one unit.

5. The trustee shall cooperate with the Univeristy of Arizona Department of Intercollegiate Athletics in processing the successful bid.

---

[1]No appeal has been taken from this final Order, Bankruptcy Rules 8001(a), 8002.

IT IS FURTHER ORDERED directing David Randall Jenkins to attend the auction and to have in his possession at that time all of the tickets, or to entrust the tickets to a responsible party who shall attend the auction in this place.

IT IS FURTHER ORDERED directing special counsel for the trustee to serve copies of this Order upon any interested parties whose names do not appear below.

DATED AT TUCSON, ARIZONA this 11 of October, 1990.

/s/
LAWRENCE OLLASON
UNITED STATES BANKRUPTCY JUDGE

Copy of the foregoing mailed this 1 day of October, 1990, to:

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United States Trustee
320 N. Central Avenue
Suite 100
Phoenix, AZ 85004

Deputy Clerk
(sm)

c: CLH, calendar

FILED
OCT 27 1990
KEVIN E. O'BRIAN, CLERK
UNITED STATES
BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	) In Proceedings Under
	) Chapter Chapter 11
THE JNC COMPANIES,	)
and Related Cases,	) Case No. 87-02065
	) -TUC-LO
	)
	) ORDER CONFIRMING
	) SALE FREE AND CLEAR
	) OF LIENS, CLAIMS,
Debtor.	) INTERESTS OR
	) ENCUMBRANCES
	)

The Court having entered its Minute Entry Order of October 11, 1990, ordering that the assignment pursuant to sale at public auction, free and clear of all liens, interests, claims or encumbrances, of the two (2) University of Arizona season basketball tickets, with concomitant rights of renewal and all other rights associated therewith be held on October 27, 1990 at the hour of 10:00 a.m.; said sale having been held as ordered;

THE COURT HEREBY ENTERS THIS ORDER:

1. Confirming the assignment pursuant to sale at public auction of two (2) University of Arizona season football tickets, being Section 104, Row 44, Seats 20 and 21 and two (2) University of Arizona season basketball tickets, being Section 5, Row 4, Seats 1 and 2 together with all associated rights of renewal, the rights to priority searing, the rights to use and enjoyment of the Stadium Club

and all other rights enjoyed by the holders of University of Arizona season tickets generally (collectively the "tickets and rights") to Hydro Geo Chem, Inc. for the sum of $ 11,000.00 paid in cash or certified funds to Fred T. Boice, Trustee;

2. Confirming that the assignment pursuant to sale at public auction of the tickets and rights are free and clear of all liens, claims, interests or encumbrances, including, but without limiting the foregoing, the liens, claims or interests, if any, of Stacia Lee Sumwalt and Greg Oester and Linda Oester;

3. Retaining jurisdiction of this matter to enforce all prior Orders of this Court pertaining to the tickets and rights, including those pertaining to delivery of the tickets and the rights which are being transferred pursuant to said prior Orders.

DATED: 10/27/90.

/S/ LAWRENCE OLLASON

United States Bankruptcy Judge

United States Constitution, Article I,
Section 8, Clause 4. Naturalization and Bankruptcy:

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

The Fifth Amendment of the Constitution of the United States:

Amendment [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the Constitution of the United States:

Amendment [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crim shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Seventh Amendment of the United States Constitution:

Amendment [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

11 USCA 363
11 U.S.C.A. s 363

UNITED STATES CODE ANNOTATED
TITLE 11. BANKRUPTCY
CHAPTER 3—CASE ADMINISTRATION
SUBCHAPTER IV—ADMINISTRATIVE POWERS
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Current through P.L. 102-255, approved 3-12-92

s 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, (12), or (13) of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

(Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2572.) (As amended Pub.L. 98-353, Title III, s 442, July 10, 1984, 98 Stat. 371; Pub.L. 99-554, Title II, s 257(k), Oct. 27, 1986, 100 Stat. 3115.)

28 USCA 144
28 U.S.C.A. s 144

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I—ORGANIZATION OF COURTS
CHAPTER 5—DISTRICT COURTS
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Current through P.L. 102-255, approved 3-12-92

s 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(June 25, 1948, c. 646, 62 Stat. 898; May 24, 1949, c. 139, s 65, 63 Stat. 99.)

28 USCA 455
28 U.S.C.A. s 455

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART I—ORGANIZATION OF COURTS
CHAPTER 21—GENERAL PROVISIONS APPLICABLE TO COURTS AND JUDGES
COPR. (c) WEST 1992 No Claim to Orig. Govt. Works
Current through P.L. 102-255, approved 3-12-92

s 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has

been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, c. 646, 62 Stat. 908.) (As amended Dec. 5, 1974, Pub.L. 93-512, s 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, s 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, s 1007, 102 Stat. 4667.)

28 USCA 1254
28 U.S.C.A. s 1254

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 81—SUPREME COURT
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Current through P.L. 102-255, approved 3-12-92

s 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928.) (As amended June 27, 1988, Pub.L. 100-352, s 2(a), (b), 102 Stat. 662.)

Filed by Clerk
Aug 16 1990
Court of Appeals
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE JNC COMPANIES, an Arizona corporation Petitioner, v. THE HONORABLE THOMAS MEEHAN, a Judge for THE SUPERIOR COURT OF THE STATE OF ARIZONA, COUNTY OF PIMA, Respondent, and FRED T. BOICE, in his official capacity as trustee in bankruptcy for The JNC Companies; THE STATE OF ARIZONA, Real Parties in Interest	)	2-CA-SA 90-0113 Department B OPINION

SPECIAL ACTION PROCEEDINGS
RELIEF GRANTED

Donald E. Gabriel Tucson
Attorney for
Petitioner

Seefeldt, Sparks &
Neal, P.C.
By Ralph E. Seefeldt Tucson
Attorneys for Real Party in
Interest Boice

Stephen D. Neely, Pima County Attorney
By Millard Rowlette Tucson
Attorneys for Real Party in
Interest State of Arizona

R O L L, Presiding Judge.

Petitioner The JNC Companies (JNC) seeks special action relief from the trial court's order declaring that JNC was represented by counsel selected by JNC's trustee in bankruptcy (Trustee) rather than counsel chosen by JNC's board of directors (board). Because JNC has no equally plain, speedy and adequate remedy by appeal and because we conclude that the trial court abused its discretion, we accept jurisdiction and grant relief. Ariz.R.P.Spec.Action 1, 3, 17B A.R.S.

FACTS AND PROCEDURAL HISTORY

In September of 1987, JNC, an Arizona corporation, filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code (the Code). 11 U.S.C. ss 1101, et seq. Real party in interest Fred T. Boice was appointed Trustee. In November of 1988, the Pima County Attorney's office filed a criminal complaint against JNC and Randall Jenkins, president and majority shareholder of JNC, in CR-24054, alleging numerous counts of commercial bribery, fraudulent schemes and artifices, criminal enterprise and securities fraud. In June of 1989, Jenkins filed a motion to

dismiss all charges pursuant to Ariz.R.Crim.P. 16.5(b), 17 A.R.S., or in the alternative, a motion to remand for a finding of probable cause pursuant to Rule 5.5. The motion was denied in October. Jenkins sought special action relief and this court declined to accept jurisdiction.

On September 13, 1989, Jenkins, JNC and other parties were indicted on numerous felony counts, including securities law violations, in CR-28738, the underlying proceeding. The Trustee subsequently notified Jenkins of his intention to have JNC enter into a plea agreement in CR-28738 and sought authorization from the bankruptcy court. Through his bankruptcy attorney, Jenkins filed a motion in bankruptcy court opposing the Trustee's plea bargaining on behalf of JNC. Thereafter, the bankruptcy court entered a minute entry order on January 2, 1990, authorizing the Trustee to plea bargain on behalf of JNC in both pending criminal matters. During the same period of time, JNC's board retained counsel to represent JNC in the criminal proceedings. On behalf of JNC, that counsel filed a motion in superior court to dismiss, a motion for appointment of independent counsel, a motion for determination of JNC's indigency and a motion to disqualify the Trustee, seeking a ruling on whether the Trustee could proceed with the proposed JNC plea agreement.

On June 1, 1990, the board-retained JNC counsel and Jenkins filed a motion in both criminal proceedings for a change of judge for cause. On July 3, 1990, at the hearing on JNC's motion, respondent presiding judge of the Pima County Superior Court ruled that counsel retained by the Trustee properly represented JNC in Pima County Cause Nos. CR-28738 and CR-24054 and that JNC's privately retained counsel was not properly before the court. This special action followed.

ISSUE

The sole issue before this court is whether a corporation that is a defendant in a state criminal proceeding and a debtor in a bankruptcy proceeding has the right to retain counsel of its own choosing in the criminal proceeding or whether it must accept counsel chosen by the trustee in bankruptcy and the trustee's decision to plea bargain. We conclude that the corporation's federal and state

constitutional rights to counsel and to a jury trial are violated by compelling the corporation to accept counsel selected by the bankruptcy trustee and the trustee's decision to waive the right to a jury trial.

CONSTITUTIONAL RIGHTS

Where, as here, a corporation is subject to criminal prosecution, it is guaranteed a right to counsel by the Sixth Amendment to the United States Constitution. See United States v. Thevis, 665 F.2d 616, 645 n. 35 (5th Cir.1982) and United States v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (3rd Cir.1979), and article II, s 24 of the Arizona constitution. "Due process of law, as it is expressed through the right-to-counsel provisions of the state and federal constitutions, comprehends a right to appear and defend with retained counsel of one's own choice." Pipkins v. Helm, 132 Ariz. 237, 239, 644 P.2d 1323, 1325 (App.1982). As a criminal defendant, JNC also has the right to a jury trial. U.S. Const. amend. VI; U.S. Const. art. III, s 2, cl. 3; Ariz. Const. art. II, ss 23 and 24.

DUTIES AND POWERS OF BANKRUPTCY TRUSTEE

The real parties in interest, the State of Arizona and the Trustee, insist that the Trustee properly represents JNC in both the bankruptcy and criminal proceedings. The authority for this broad power over the debtor corporation, they contend, is provided by the Code, the bankruptcy rules and applicable law.

a. Trustee's responsibilities re: the estate.

When a bankruptcy proceeding is commenced, all corporate property passes to the bankruptcy estate and the estate is represented by the trustee. 11 U.S.C. ss 323, 541. The trustee is accountable for that property and has the duty to maximize the estate. 11 U.S.C. s 704(1), (2). The trustee must investigate the debtor's financial affairs, 11 U.S.C. ss 704(4), 1106(a)(3), and may sue the officers, directors and other insiders on behalf of the estate to recover

fraudulent or preferential transfers of the debtor's property. 11 U.S.C. ss 547(b)(4)(B), 548. Clearly, the trustee has broad powers in dealing with matters that relate to the estate, including the power to actively litigate matters outside bankruptcy court which have an impact upon the estate.

b. Estate distinguishable from debtor.

The estate created by the filing of a bankruptcy petition "is an entity distinct from the debtor." 8A C.J.S. Bankruptcy s 105 at 104 (1988). Not everything that belongs to the debtor becomes part of the bankruptcy estate over which the trustee has control. "The estate generally includes all legal or equitable interests of the debtor in property as of the commencement of the case...." Id., citing In re Larson, 56 B.R. 154 (Bkrtcy.D.Mont.1985); see also 11 U.S.C. s 541(a)(1). We find nothing in the bankruptcy code or case law to support the conclusion that once a bankruptcy proceeding is commenced, the debtor's constitutional rights pass through to the estate along with the property and property rights that are traditionally considered part of the estate.

"The trustee has standing only to represent the interests of the estate." 8A C.J.S. Bankruptcy s 28 at 45. Indeed, s 323(a) of the Code, relied upon by the state and the Trustee, provides that the trustee "is the representative of the estate...." 11 U.S.C. s 323(a) (emphasis added). The Code does not purport to designate the trustee as the representative of the debtor. Accordingly, we do not believe that s 327 authorizes the trustee to retain counsel against the debtor's will to represent the debtor in a criminal proceeding in which the debtor, not the estate, is a defendant.

c. Trustee's power to retain professionals.

Section 327(a) gives the trustee the power to retain professionals "to represent or assist the trustee in carrying out the trustee's duties under [the Code]." Those duties, as described generally in s 323 and more specifically throughout the Code, relate directly to the management and preservation of the estate. Similarly, such professionals may be retained if already employed by the debtor and "necessary in the operation of [the debtor's] business," 11 U.S.C.

s 327(b), and where it is in the estate's best interests. s 327(d), (e). Section 327 has been construed to allow the court to appoint counsel to represent the debtor in a criminal proceeding where the debtor is requesting such appointment and demonstrates that the representation will be beneficial to the estate. See The Official Comm. of Disputed Litig. Creditors v. McDonald Invs., Inc., 42 B.R. 981 (N.D.Tex.1984); In re Duque, 33 B.R. 199 (Bkrtcy.S.D.Fla.1983); but see In re Delk, 27 B.R. 86 (Bkrtcy.W.D.Okla.1983) (appointment of counsel to defend debtor against indictment and use of estate funds to pay counsel do not relate to duties under the Code and are not authorized under s 327(a)); In re Pajarito Am. Indian Art, Inc., 11 B.R. 807 (Bkrtcy.D.Ariz.1981) (estate funds cannot be used to pay debtor's criminal defense counsel). Section 327, contrary to the contention of the state and the Trustee, does not authorize the bankruptcy trustee to compel the debtor to be represented in a criminal prosecution by counsel of the trustee's choosing over the debtor's objection, nor does it authorize the trustee to waive the criminal defendant debtor's right to a jury trial.

d. Bankruptcy Rule 6009.

The state and the Trustee argue that Bankruptcy Rule 6009, 11 U.S.C., provides additional support for the Trustee's representation of JNC in the state criminal proceedings. The rule states:

> With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal.

The rule is inapplicable, even assuming state criminal proceedings against the debtor were intended to be within its purview. The rule allows the trustee to defend actions pending at the time the bankruptcy proceeding is commenced. The proceeding below was commenced at least one year after the bankruptcy action. Moreover, the rule must be construed in harmony with the Code. The capacity to sue or be sued under s 323(b) "is a logical adjunct to the duties to be performed by the trustee and to the authority vested in him by Bankruptcy Rule 6009." 2 Collier on Bankr., s 323.02 at 323-4 (15th ed. 1990)

(footnote omitted). As such, we conclude that it allows the trustee to prosecute and defend actions that impact upon the trustee's duties in managing the estate, again recognizing the separateness of the debtor and the debtor's estate.

e. Weintraub inapplicable.

The state and the Trustee contend that Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985), also supports their position. Weintraub, however, is distinguishable because it involved the trustee's ability to waive the corporate debtor's attorney-client privilege during an investigation by the Commodity Futures Trading Commission for purposes of discovering information from corporate counsel regarding the conduct of the corporation's prior managers; it did not involve the trustee's waiver of the corporation's constitutional rights. Although Congress, in its plenary power, may abrogate certain state laws, U.S. Const. art. I, s 8, cl. 4, it may not do so in violation of constitutional rights. See, e.g., Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589-90, 55 S.Ct. 854, 863-64, 79 L.Ed. 1593, 1604-05 (1935); In re Penn Cent. Transp. Co., 494 F.2d 270, 278 (3rd Cir.1974); United States v. Rome, 414 F.Supp. 517, 519 (D.Mass.1976).

Applying a balancing test, the Weintraub Court held that allowing the trustee to waive the attorney-client privilege as to the pre-bankruptcy communications of a corporate debtor did not impair a federal interest and that certain bankruptcy goals would be frustrated if the privilege could not be waived, including the trustee's power and obligation to investigate prior management to uncover and assert

causes of action against them. In Weintraub, the Supreme Court focused on the fact that the trustee's functions in a bankruptcy proceeding "are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors." 471 U.S. at 356, 105 S.Ct. at 1995, 85 L.Ed.2d at 383. It is the trustee that may continue operating the business. For that purpose, the pre-bankruptcy managers are "completely ousted." 471 U.S. at 352-53, 105 S.Ct. at 1993, 85 L.Ed.2d at 381.

While the Supreme Court stated that a bankruptcy trustee has broad control over the debtor, it was in the context of the management of the corporation and in the exercise of duties provided by the Code. We find no indication that Weintraub extends this control to a criminal proceeding against the debtor, or that Weintraub authorizes the trustee to exercise his/her power over the estate at the expense of the debtor's constitutional rights.

CONFLICT OF INTEREST

In addition to the fact that the trial court's order violates JNC's right to retained counsel of its own choice, Pipkins v. Helm, supra, the Trustee, who owes a fiduciary duty to the creditors, see In re O.P.M. Leasing Servs., Inc., 28 B.R. 740 (Bkrtcy.S.D.N.Y.1983), and whose primary responsibility is to preserve the estate, has a conflict of interest that counsel retained by the corporation would not have. Indeed, JNC's admission of wrongdoing purportedly could be used as a basis for rescinding investor promissory notes, rather than forgiving them, thereby avoiding the tax burdens to such investors of having to recognize ordinary income. Additionally, the Trustee concedes in its response that the plea negotiations were conducted based upon a cost/benefit analysis of the risks involved in not accepting a plea offer, "a business decision made by the Trustee in conjunction with his duties." The Trustee admits his eagerness to accept the state's plea offer because JNC would only be fined $100, without discussion of whether the corporation, through the acts of its directors and/or shareholders, would likely be convicted of the crimes charged based upon the anticipated evidence and whether JNC, the actual defendant, had chosen to waive its right to a jury trial. Thus, the Trustee reasons, JNC's guilty plea would avoid the risk of extensive fines and potential forfeitures which would diminish the

bankruptcy estate. Additionally, the Trustee claims, a guilty plea by JNC would enable the estate to avoid the incurrence of substantial legal fees. But see In re Pajarito Am. Indian Art, Inc., supra.[1]

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[1] Although the extent to which the resolution of the criminal proceeding might impact upon JNC's bankruptcy is not material to our decision, we note that the Trustee misperceives the likely import of this court's decision. The Trustee cites no authority in support of its concerns. First, although jurisdictions are split on this issue, an Arizona bankruptcy court has held that estate funds may not be used to pay a debtor's criminal defense counsel. In re Pajarito Am. Indian Art, Inc., supra. Second, with regard to any forfeitures of property, there are a multitude of protections for the creditors, including the following: (1) the argument that the property is now estate property under s 541(A)(1) of the Code which includes "all legal or equitable interests of the debtor in property as of the commencement of the case"; (2) any forfeiture proceeding by the state is subject to the automatic stay provision of s 362(a), see Sachs v. Ryan, 15 B.R. 514 (Bkrtcy.D.Md.1981) and Sachs v. Ryan, 32 B.R. 794 (Bkrtcy.D.Md.1983); and (3) to the extent a forfeiture claim could be presented as a claim against the estate, it would be subject to the priority provisions of s 507 of the Code, see also s 726(a) (order of distribution in the event JNC converts the proceeding to one under Chapter 7 of the Code). As a consequence, any forfeiture would be satisfied after unsecured creditors, with any deficiency remaining nondischargeable. Cf. Sachs v. Ryan, supra, 15 B.R. 514. Finally, with regard to the Trustee's concerns that penalties and fines would deplete the estate, the reorganization plan submitted by the Trustee pursuant to s 1123 of the Code and which may be influenced by creditors, 11 U.S.C. s 1103(c)(3), will presumably assure that such payments are made after unsecured creditors have been compensated. Moreover, in the-event the proceeding is converted to a Chapter 7 proceeding, there is ample support for the proposition that such claims would be disallowed. See Simonson v. Granquist, 369 U.S. 38, 82 S.Ct. 537, 7 L.Ed.2d 557 (1962); In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59 (S.D.N.Y.1976).

Although financial considerations appropriately dictate the Trustee's preference of alternatives, it is for this very reason that the Trustee should not control JNC's defense in the criminal prosecution. The mere fact that JNC filed a bankruptcy petition does not mean that the only counsel to which it is entitled in a criminal proceeding is one who makes decisions from purely a business perspective and based upon how to resolve the criminal matter so as to maximize the benefit to creditors. Nor does it mean that JNC must relinquish its right to a jury trial simply because the Trustee considers it a sound business decision and in the estate's best interests. When a criminal defendant is offered a plea agreement, many factors are relevant to the defendant's decision. The financial impact of proceeding to trial is but one factor to be considered. Others include the opportunity to vindicate one's name, disprove inaccurate allegations, and the likelihood of conviction. Clearly, the decision to waive the right to jury trial in a criminal proceeding is the defendant's right, not the trustee's. As this state's constitution provides, "[t]he right of trial by jury shall remain inviolate." Ariz. Const. art. II, s 23.

BANKRUPTCY COURT AUTHORIZATION OF REPRESENTATIVE

The bankruptcy court authorized the Trustee to negotiate the plea agreement on behalf of JNC. Because JNC, as opposed to its estate in bankruptcy, is the party to the criminal action and in light of our conclusions regarding the limitations on the Trustee's powers and duties, the bankruptcy court was without jurisdiction to decide who would represent JNC in the state criminal proceedings and could not authorize the Trustee to waive JNC's right to a jury trial. In Younger v. Harris, 401 U.S. 37, 43, 91 S.Ct. 746, 750, 27 L.Ed.2d 669, 675 (1971), the Supreme Court stated:

> Since the beginning of the country's history Congress has, subject to a few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

This policy applies equally where the federal court is acting under the Code. In re Diversa-Graphics, Inc., 8 Collier Bankr.Cas. 59, 63 (S.D.N.Y.1976); see also In re Trial West, Inc., 17 B.R. 330 (Bkrtcy.D.S.D.1982).

It is clear that Congress particularly intended to preclude federal bankruptcy courts from interfering with state criminal proceedings. For example, criminal proceedings against the debtor are excepted from the automatic stay provision of s 362(a). 11 U.S.C. s 362(b)(1); see also In re M. Frenville Co., Inc., 744 F.2d 332 (3d Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985); Trail West, Inc., supra; 2 Collier on Bankr. 362.05 [1].

For the reasons set forth above, the bankruptcy court's action is not dispositive of the issue before us.

CONCLUSION

We conclude that the right to counsel and the right to a jury trial under the Sixth Amendment to the United States Constitution and article II, s 24 of the Arizona Constitution must remain inviolate notwithstanding the fact that a defendant is also debtor in a bankruptcy proceeding. Because JNC's federal and state constitutional rights are violated by the trial court's order, the order is vacated, and this matter is remanded for further proceedings consistent with this decision.

/s/
JOHN M. ROLL, Presiding Judge

CONCURRING:

/S/
MICHAEL A. LACAGNINA, Judge

/s/
JAMES D. HATHAWAY, Judge

Supreme Court, U.S.
FILED
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No. 91-2053

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STACIA LEE SUMWALT AND
DAVID RANDALL JENKINS,

Petitioners,

v.

FRED T. BOICE, in his official capacity as trustee in bankruptcy, EQUITY SECURITIES-HOLDERS' COMMITTEE, UNIVERSITY OF ARIZONA, and HYDRO GEO CHEM, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT FRED T. BOICE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioners' appeal of a Bankruptcy Court order authorizing the sale of Jenkins' University of Arizona football and basketball tickets properly dismissed as moot by the District Court and Court of Appeals pursuant to 11 U.S.C. §363(m) where Petitioners failed to obtain a stay of the order pending appeal?

LIST OF PARTIES

Contrary to the List of Parties in the Petition, Stacia Lee Sumwalt never requested, nor was granted, leave to intervene below, and Hydro Geo Chem, Inc. was not a party below, nor did it make any appearance below.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT FRED T. BOICE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Fred T. Boice, in his official capacity as trustee in bankruptcy (the "Trustee"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's Memorandum Decision and its order denying rehearing in this case.

JURISDICTION

Petitioners did not file a Notice of Appeal within 10 days of the Bankruptcy Court's Minute Entry Order of September 6, 1990 which granted the Trustee's motion to assume the executory contract for the tickets and to sell them at public auction. *See* Bkrtcy. Rule 8002(a). As noted in the Petition, the Bankruptcy Judge considered the September 6 order to be a final order. Petition, p. 5. A failure to timely appeal deprives the appellate courts of jurisdiction to hear the appeal. *United States v. Robinson*, 361 U.S. 220, 224 (1960); *In re Slimick*, 928 F.2d 304 (9th Cir. 1990) (absence of findings and conclusions does not prevent an order from becoming final, and appellant bears burden of seeking clarification of ambiguous appeal deadline).

Furthermore, contrary to the statement in the Petition (p. 2), Sumwalt, who is neither a debtor or creditor in this bankruptcy, never sought leave to intervene in the proceedings below, although she spontaneously made several filings. Over the Trustee's objection, the Bankruptcy Judge "assumed," without deciding, that she had standing to appear in the bankruptcy proceedings.[1]

Because the District Court and Ninth Circuit appeals were dismissed as moot, neither of those courts ruled upon the jurisdiction or standing issues, which would need to be decided by this Court.

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[1] The reprint in the Petition of the Bankruptcy Court's Minute Entry Order dated September 17, 1990 is in error. In the Petition, the Order reads, ". . . assuming *arguendo* Sumwalt does not have standing . . . ." Petition, p. A-10. The Order actually states, ". . . assuming *arguendo* Sumwalt does have standing . . . ."

STATEMENT OF THE CASE

Jenkins filed for Chapter 11 bankruptcy relief on September 24, 1987. His case has been jointly administered with the Chapter 11 cases filed by 44 limited partnerships and a corporation controlled by Jenkins known as The JNC Companies ("JNC"). Respondent Fred T. Boice has served as the trustee for all these cases.

At the time Jenkins made his Chapter 11 filing, he held an interest in an executory contact to use and renew two college football and basketball tickets. This case involves the disposition of that interest in Jenkins' bankruptcy proceeding.

Upon motion of the Trustee, the Bankruptcy Court, by Minute Entry Order of September 6, 1990, authorized the sale of the tickets pursuant to 11 U.S.C. §363. The date (October 27, 1990) and the procedures for the sale were established by a Minute Entry Order dated October 11, 1990. Jenkins filed a Notice of Appeal from those orders on October 19, 1990. Sumwalt, who had made several unauthorized filings in these proceedings before the Bankruptcy Court, filed her Notice of Appeal on October 22, 1990.

Neither Jenkins nor Sumwalt requested the Bankruptcy Court to issue a stay of these orders pending appeal. *See* Bkrtcy. Rule 8005.[2] Nor did they request that the District Court expedite the appeal on an emergency basis, as is not

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[2] In an effort to stop the sale, on September 12, 1990, prior to any appeal, Sumwalt filed in the District Court a Petition for Writ of Prohibition And/Or Writ of Mandamus And/Or Other Extraordinary Relief, as well as an Ex Parte Application for Interlocutory Stay of Proceedings pending a determination of the Petition. Both the Petition and Application were denied.

uncommon in bankruptcy practice. Instead, they each filed a request for interlocutory stay pending appeal with the District Court. Those requests were denied on October 24, 1990. That same day, Jenkins and Sumwalt filed an Emergency Petition for Writ of Mandamus with the Ninth Circuit seeking various forms of relief to block the sale of the tickets, including an interlocutory stay pending appeal. On October 27, 1990, the Ninth Circuit denied the Emergency Petition and request for interlocutory stay. As scheduled, the tickets were sold at public auction on October 27, 1990 to a good faith purchaser, Hydro Geo Chem, Inc., and the Bankruptcy Court entered an order confirming the sale.

The Trustee moved to dismiss the District Court appeal on mootness grounds pursuant to 11 U.S.C. §363(m). That motion was granted on January 3, 1991 and the appeal dismissed. Jenkins and Sumwalt then appealed to the Ninth Circuit, which entered its Memorandum Decision dismissing the appeal on March 2, 1992. A Petition for Rehearing was denied on April 1, 1992.

REASONS FOR DENYING THE WRIT

I. PROCEDURAL INFIRMITIES DICTATE THAT THE WRIT BE DENIED.

A. Petitioners failed to timely appeal from the September 6 Order authorizing the sale of the tickets as required by Bankruptcy Rule 8002(a). In an apparent attempt to cure this defect, Petitioners alleged in their original Notices of Appeal from Bankruptcy Court to the District Court "that the [Bankruptcy] Court's September 6, 1990 Minute Entry Order was interlocutory . . . ."[3] However, before the Ninth Circuit, Petitioners affirmatively asserted that the September 6 Order (as well as the September 17, October 11 and October 27 Orders) was "final and appealable to the District Court pursuant to 28 U.S.C. §158(a)." In either event, Bankruptcy Rules 8001(a) and (b), in conjunction with Rule 8002(a), require that a Notice of Appeal be filed within 10 days. Failure to do so jurisdictionally bars the appeal.

B. Petitioners ask this Court to determine what Congress intended in enacting the mootness rule of 11 U.S.C. §363(m). However, they did not make the same request of any of the courts below. Since this issue of congressional intent was neither raised before, nor discussed by, the courts below, this Court should not entertain the question. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976).

C. The Petition for Certiorari requests a remand directing the Bankruptcy Court "to grant Petitioners the right to renew the athletic event tickets . . . ." Petition, p. 20. In order to accomplish that, the tickets would have to be taken

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[3] To the extent Petitioners believed the Order was interlocutory, they did not file a motion for leave to appeal as required by Bankruptcy Rule 8001(b).

away from the successful bidder at auction, Hydro Geo Chem. However, Petitioners never joined Hydro Geo Chem in any proceeding in the Bankruptcy Court, never asserted any claim against it, and did not include Hydro Geo Chem in the Notice of Appeal to the District Court. *See In re Royal Properties, Inc.,* 621 F.2d 984, 987 (9th Cir. 1980) (appeal properly dismissed where appellant failed to obtain a stay prior to sale and purchaser was not a party to the appeal).

Belatedly recognizing this fatal omission, Jenkins and Sumwalt adopted the novel approach of moving to join Hydro Geo Chem as an "indispensable party" *on appeal* before the District Court, even though there is no authority for such procedure in either the Bankruptcy Rules regarding appeals or the Federal Rules of Appellate Procedure. That motion was denied as moot when the District Court dismissed the appeal.

Hydro Geo Chem has never been made a party to any of these proceedings nor has it ever made an appearance. As Jenkins and Sumwalt acknowledged before the District Court, "Appellants [Petitioners] cannot obtain effective relief" without the joinder of Hydro Geo Chem.[4]

Before the Ninth Circuit, Petitioners contended that Hydro Geo Chem had received "effective notice" of the appeal. However, not only has no such factual finding ever been made, but notice of an action does not equate with being a party to an action. Since no effective relief can be

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[4] In an effort to salvage their appeal, Jenkins and Sumwalt suggested to the Ninth Circuit that, in lieu of the tickets themselves, they could be awarded the monies received by the Trustee for the tickets. Assuming, *arguendo*, that that might have been a viable alternative (if their appeal had not been moot), the request, made for the first time in the Court of Appeals, came too late.

granted to Petitioners, Supreme Court review would be inappropriate. *See Mills v. Green*, 159 U.S. 651 (1895).

D. In addition to the mootness issue, Petitioners request the Court to rule on the merits of the "disqualification" and "property of the estate" issues. However, neither the District Court on appeal, nor the Ninth Circuit, reached the merits of those issues. This Court should also decline to do so. *See Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32, 37 n.5 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 54 (1991).

II. THIS IS NOT A "SPECIAL" CASE WHICH IS WORTHY OF SUPREME COURT REVIEW.

There are no "special and important reasons" which would indicate that this Court should grant the Petition. The Ninth Circuit's decision does not conflict with other circuit court decisions, nor with any applicable decision of this Court. Moreover, the Memorandum Decision does not deal with an important question of Federal law which requires review by this Court. While Petitioners have made every effort to clothe this dispute in Constitutional dress in order to justify their Herculean efforts before four different courts, in reality those efforts merely expose an unshakable obsession with these tickets and Petitioners' inability to deal with having to sit elsewhere.

A. Jenkins and Sumwalt argue that 11 U.S.C. §363(m) does not apply to this case because of their contention that the tickets were not property of the bankruptcy estate. However, Petitioners acknowledged before the Court of Appeals that there is no conflict among the circuits on this issue:

> At the outset, this Court must recognize other Courts of Appeals have held that in the absence

> of a stay pending review, 11 U.S.C. §363(m) is a bar to the exercise of appellate jurisdiction in all cases, even where the sale of property involved a sale of property that did not belong to the bankruptcy estate.

Appellants' Opening Brief, pp. 13-14, citing *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990); and *In the Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990). Although Petitioners now assert that the Memorandum Decision conflicts with prior Ninth Circuit decisions, they admitted below that this case does not fall within any of the very narrow exceptions to the §363(m) mootness rule recognized by the Ninth Circuit. Moreover, to the extent they actually believed there was such a conflict, they did not make a suggestion for rehearing *en banc*. *See* Rule 35, Fed. R. App. P., Ninth Circuit R. 35-1.

B. Petitioners also claim that they did not have an adequate hearing before the Bankruptcy Court because the Bankruptcy Judge allegedly was biased and prejudiced and should have disqualified himself.[5] According to Petitioners, the "bias and prejudice" is evidenced by (1) the judge's comment that "I don't think a bankrupt ought to be sitting in the first row of the basketball arena when the tickets are going for $5000 a pop," and (2) the judge's participation in the "scheme" against JNC in which the judge authorized the Trustee to enter a *nolo contendere* plea for JNC on one misdemeanor count in a state court criminal proceeding.[6]

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[5] The District Court described the allegations of bias and prejudice as "wholly without merit and bordering on the scandalous."

[6] Petitioners and JNC have alleged the existence of a number of schemes and conspiracies against them in relation to these proceedings. (continued...)

Incredibly, Petitioners assert that the Bankruptcy Judge's comment about the tickets indicates that he is socially prejudiced against bankruptcy debtors because he allegedly believes that they are not worthy to sit in particular locations at collegiate sporting events. To the contrary, the judge was merely expressing a legitimate concern that in liquidating the bankruptcy estate, the Trustee should not overlook any valuable asset. However, if one accepts the Petitioners' analysis that this comment evidences prejudice toward bankrupts, then this judge would be disqualified from hearing any case in bankruptcy.

With respect to the bankruptcy court's authorization to permit the Trustee to enter a *nolo contendere* plea on behalf of JNC, the most that can be said is that that may have been an erroneous legal ruling which was remedied by the Arizona Court of Appeals when it decided that JNC had a right to counsel of its own choosing. Petition, p. C-1. Petitioners' theory would require that every judge who makes an erroneous legal ruling be disqualified for bias and prejudice.

Furthermore, while 28 U.S.C. §144 and 28 U.S.C. §455 differ procedurally, in order to disqualify a judge pursuant to either section, the alleged bias or prejudice must result from an extra-judicial source. *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978), *vacated on other grounds*, *Harrington v. United States*, 443 U.S. 914 (1979);

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[6](...continued)
According to various filings made by the Petitioners, the co-conspirators have included, *inter alia*, the bankruptcy judge, the Trustee, the Trustee's counsel, the Trustee's accountants, Admiral Insurance Company (one of the creditors), W.R. Berkley Corporation (Admiral's parent company), numerous officers and directors of Berkley, Admiral's counsel, the Pima County (Arizona) Attorney and at least two of his deputies, Pima County itself, each of the members of the Pima County Board of Supervisors, and all of the sitting judges on the Pima County Superior Court.

United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986); *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880 (9th Cir. 1991). No extra-judicial source exists in the present case since the allegedly objectionable conduct occurred strictly in the course of the Bankruptcy Judge's administration of the pending bankruptcy proceedings.

Petitioners' contention below that an extra-judicial source of bias and prejudice is no longer required for recusal is based upon a misreading of *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989). In *Van Griffin*, the Ninth Circuit held that a magistrate was disqualified under §455(a) because of his possession of an *ex parte* communication. The *Van Griffin* court did not address whether it deemed the source of the bias to be extra-judicial; yet, by its very nature, an *ex parte* communication is outside of the judicial process. Moreover, the recent decision in *Pau v. Yosemite Park and Curry Co.*, *supra*, confirms that disqualification under §455(a) is required "only if the bias or prejudice stems from an extra-judicial source and not from conduct or rulings made during the course of the proceedings." *Id.* at 885.

C. Finally, Petitioners' contention below that the policies underlying the Fifth Amendment "outweigh" the policies underlying §363(m) is based on the incorrect assumption that the two provisions are mutually exclusive. In this case, the Bankruptcy Court provided ample notice and an opportunity to be heard on the Trustee's motion to assume and assign the executory contract for the tickets. As discussed above, Petitioners also sought relief, in the form of requests for Writs of Mandamus and interlocutory stays, from both the District Court and the Ninth Circuit. In connection with those applications, Petitioners extensively briefed both the disqualification and property of the estate issues. Yet, they were unable to convince even one of the five judges to whom these arguments were presented that their position had sufficient merit to even warrant a stay pending appeal.

The Due Process clause does not "confer 'a right to interminably litigate [an] issue.'" *In re Citizens Mortgage Investment Trust*, 25 B.R. 1005, 1008 (D. Mass. 1982) (quoting *Clarkson Construction Co. v. Occupational Safety and Health Review Commission*, 531 F.2d 451, 456 (10th Cir. 1976)). The application of 11 U.S.C. §363(m) in this case will not deprive Petitioners of property without due process, but will simply bring this dispute to a well-deserved end.

CONCLUSION

For the foregoing reasons, this Court should decline to review this case by writ of certiorari.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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August 17, 1992

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PETITIONERS' REPLY MEMORANDUM

In urging the Court to deny Petitioners' request for a writ of certiorari, Boice raises several issues, all of which, Petitioners demonstrate, are without merit. Petitioners herein demonstrate the issues raised in their Petition are worthy of consideration.

I. The Bankruptcy Court's Actions Are Equivalent To Granting Petitioner Stacia Lee Sumwalt Leave To Intervene.

Boice raises the issue that Sumwalt never sought nor was granted intervention by the Bankruptcy Court and, as a result, she lacks standing before this Court. Opp. at ii and 2. The Bankruptcy Court's actions, however, are equivalent to granting intervention.

The Bankruptcy Court's September 6, 1990 Order recognizes Sumwalt's opposition to the Trustee's Assumption Motion. Petition at A-8. Further, Boice raised this very issue before the Bankruptcy Court in his motion to strike Sumwalt's pleadings. The Bankruptcy Court denied Boice's motion to strike. Petition at A-11. The Bankruptcy Court also denied Sumwalt's motion to disqualify and motion for an interlocutory stay pending appeal. *Id.*

The foregoing actions by the Bankruptcy Court are equivalent to having granted Sumwalt the right to intervene since the Bankruptcy Court treated Sumwalt as if she were a party. As a result, she was bound by the Bankruptcy Court's Orders and, having been aggrieved thereby, has standing to challenge those orders on appeal. This Court has recognized that one who has been treated as a party has a right to appeal from a judgment. *Karcher v. May*, 484 U.S. 72, 77 (1987) (citations omitted). Similarly, the courts of appeal have recognized that when a trial court treats one as if they were a party, the trial court's actions are equivalent to having granted intervention. *In re Vargas*, 723 F.2d 1461, 1464 (10th Cir. 1983); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 788-789 (5th Cir. 1979); *Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir. 1972). Sumwalt is a party properly before this Court.

II. Hydro Geo Chem, Inc. Is A Party To This Action.

Boice suggests that Hydro Geo Chem, Inc. is not a proper party to these proceedings. This suggestion is erroneous and not

supported by case law or statute. As a threshold matter, Bankr. Rule 8001, 11 U.S.C., provides that the failure of the appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal, but is ground for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. Bankr. Rule 8001(a), 11 U.S.C. Since the District Court dismissed the Petitioners motion to join Hydro Geo Chem, Inc. as an indispensable party as moot for the reason that it dismissed the appeal as moot, the action by the District Court, as contemplated by Bankruptcy Rule 8001, has not yet been completed.

Jenkins and Sumwalt filed their timely notices of appeal to the District Court on October 19 and 22, 1991. Those notices did not list Hydro Geo Chem, Inc. as a party because the identity of Hydro Geo Chem, Inc. as the successful auction bidder was unknown to all parties at that time. However, on October 26, 1992, the day before the auction, Jenkins and Sumwalt filed notices recounting that appeals had been taken and that the trustee had a duty to inform the successful auction bidder that an appeal had been filed and that Jenkins and Sumwalt claimed that the Bankruptcy Court's taking from them of the right to use and renew the disputed athletic tickets was void, and that they intended to reclaim such rights from the successful auction bidder on appeal.

Prior to the auction and in open court, specially appointed counsel for the trustee, Susan G. Boswell, informed all auction bidders that Jenkins and Sumwalt continued their objection to the Bankruptcy Judge's jurisdiction to take their rights to use and renew the disputed athletic tickets, that Jenkins and Sumwalt intended to reclaim those rights from the successful auction bidder and that an appeal of the Bankruptcy Court's Orders had been filed by Jenkins and Sumwalt. As a result of the foregoing, both the Court, the Clerk and the successful auction bidder, Hydro Geo Chem, Inc., had written and oral notice of the appeal within the meaning of Bankruptcy Rule 8001(a).

Any argument that the notice to Hydro Geo Chem, Inc. was not filed *after* the Bankruptcy Court entered its October 27, 1990 Order confirming the auction sale to Hydro Geo Chem, Inc. is misplaced. In *Firstier Mortgage Company v. Investors Mortgage Insurance Company*, --- U.S.---, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991), this Court held that a notice of appeal filed in advance of the final order shall be treated as filed after such entry and on the

date thereof. The notices filed on October 26, 1990 by Jenkins and Sumwalt, and recounted by the trustee's special counsel at the time of the auction in open court, gave actual notice to the Court, the Clerk and Hydro Geo Chem, Inc. and, in conjunction with the notices of appeal filed on October 19 and 22, 1990, complied with the requirements of Bankruptcy Rule 8001, 11 U.S.C.

Should the Court determine that it is not appropriate for it to address this issue in the first instance, and in the hypothetical event the Court decides that the appeal is not moot and vacates the Ninth Circuit's and District Court's judgments and orders accordingly, the Court can remand these proceedings to the District Court to allow the District Court to address the motion to join Hydro Geo Chem, Inc. as contemplated by Bankr. Rule 8001, 11 U.S.C. In any event, Petitioners prayed for an award of the proceeds from the sale as compensation for the taking of their rights to use and renew the disputed athletic tickets. As a result, the Court can grant effective relief whether Hydro Geo Chem, Inc. is a party or not. Accordingly, Petitioners urge the Court to address the issues raised in the Petition.

III. Petitioners Filed A Timely Notice Of Appeal.

Boice asserts that the Bankruptcy Court's September 6, 1990 Order was that court's final order, from which bankruptcy appeal time limits apply. Opp. at 2 and 5. This assertion is in error.

On August 13, 1990, Jenkins and Sumwalt separately moved the Bankruptcy Court, pursuant to 28 U.S.C. §157(b)(3), §1134-(c)(2) and Bankr. Rule 5011(b), 11 U.S.C., for its Order determining the Trustee's Assumption Motion to be non-core but related to the administration of a Chapter 11 case and for its Order abstaining from hearing and determining the matter. Petitioners objected to and did not consent to the Bankruptcy Court's subject matter jurisdiction within the meaning of 28 U.S.C. §157(c)(2); and affirmatively asserted their right to trial by jury pursuant to the Seventh Amendment of the United States Constitution.

Neither the Bankruptcy Court's September 6 nor September 17, 1990 Orders determine whether the proceeding before it was a core or non-core proceeding. Petition at pp. A-8 and A-10. Moreover, neither Order indicates whether the Bankruptcy Court intended to submit its findings of fact and conclusions of law to the District Court for entry of a final judgment pursuant to 28 U.S.C. §157(c)(1) and Bankr. Rule 9033, 11 U.S.C. At least one lower

court decision holds that the Bankruptcy Court's judgment is invalid where the Bankruptcy Court fails to determine whether a proceeding involved a core or non-core proceeding, particularly when so moved by the parties and particularly where the parties have objected to the bankruptcy court entering a final judgment. *In re Marill Alarm Systems, Inc.*, 81 B.R. 119 (S.D.Fla. 1987).

The Bankruptcy Court's October 11, 1990 Order was the first indication, implicitly or explicitly, that the Bankruptcy Court intended to treat the matter as one over which it had subject matter jurisdiction to enter a final judgment. Petition at A-13, note 1. Only then did it become apparent to Jenkins and Sumwalt that the Bankruptcy Court did not intend to adjudicate their core/non-core determination and abstention motions and did not intend to submit findings of fact and conclusions of law to the District Court for entry of a final judgment. Thereafter, Jenkins filed a timely notice of appeal on October 19, 1990 and Sumwalt filed a timely notice of appeal on October 22, 1990.[1] Jenkins and Sumwalt have met all jurisdictional time requirements to be properly before this Court. Bankr. Rule 8002, 11 U.S.C.

IV. All Issues Were Raised Before The Courts Below.

Boice suggests that the issue of Congressional intent underlying the enactment of 11 U.S.C. §363(m) was not raised before the courts below and is not properly before this Court. Boice cited *Youakim v. Miller*, 425 U.S. 231, 234 (1976) in support of that proposition. In *Youakim*, the Court recognized that it would not ordinarily decide questions not passed on or resolved in the lower court. *Youakim*, at 234. The *Youakim* Court recognized that a Supremacy Clause claim had not been presented to the District Court in the first instance. *Youakim*, at 233. *Youakim* did not specifically deal with the failure to raise Congressional intent behind a statutory claim litigated below. To that extent, Boice misleads the Court as to *Youakim's* relevance.

The issue raised in the Petition in the instant case is the same issue raised in the courts below. The issue is whether bankruptcy's mootness rule eviscerates appellate review of constitutional claims. That issue and the purpose, scope and intent

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[1] Respectively, October 20 and 21, 1990 were a Saturday and Sunday. Accordingly, Sumwalt's filing on October 22, 1990 was timely.

of 11 U.S.C. §363(m) were the cornerstone of the litigation below. Any distinction between how that issue is framed in the Petition versus the substance of the litigation below is a distinction in form without meaning in substance. Accordingly, Boice's claim that the purpose and intent of 11 U.S.C. §363(m) was not litigated below is without merit.

Boice also suggests that the Petitioners admitted below that their constitutional claims do not fall within any of the narrow exceptions to the §363(m) mootness rule recognized by the Ninth Circuit. Opp. at p. 8. This is a misleading and untrue statement. Indeed, the Petitioners cited the Ninth Circuit decision *In re Center Wholesale*, 759 F.2d 1440 (9th Cir. 1985), for the proposition that the Ninth Circuit had previously recognized that, in the absence of a stay pending appeal, only a constitutional claim would survive a claim of mootness on appeal. In that case the Ninth Circuit found that lack of adequate notice violated the Due Process Clause. The Ninth Circuit panel in the instant case failed to distinguish *In re Center Wholesale*.

V. Section 455(a) Does Not Require An Extra-judicial Source.

Boice asserts that 28 U.S.C. §455(a) requires an extra-judicial source as a basis for a judge's disqualification. Opp. at p. 9. Indeed, Boice cites prevailing Ninth Circuit precedent in support of that proposition. However, the authorities cited by Boice fail to countenance this Court's Holding in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Based on *Liljeberg's* holding that Congress intended that disqualification under Section 455(a) is broader in scope than the more strictly construed provisions of Section 455(b), the extra-judicial source requirement is no longer an element of the law of Section 455(a).

Section 455(a) provides "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). There is no explicit reference to the extra-judicial source requirement in this language.

The genesis of the extra-judicial source requirement can be traced to the revision of the Judicial Code enacted by Congress on March 3, 1911 and codified as Section 21 of the Judicial Code effective January 1, 1912.[2] Section 21 was the first codification

[2] Act of March 3, 1911, Chap. 231, 36 Statutes at Large 1087-1169 (62nd

of the personal bias or prejudice standard for federal judicial disqualification.[3]

The Fifth Circuit was the first court to tie the extra-judicial source requirement to the word "personal" for purposes of interpreting the personal bias or prejudice standard. In *Henry v. Speer*, 201 F. 869 (5th Cir. 1913), the Fifth Circuit, while considering a Petition for Mandamus relief, held that the 'personal' element of the personal bias or prejudice standard engendered the extra-judicial source requirement. *Henry*, 201 F. at 871-872.

A short time later, this Court addressed its first case interpreting Section 21 of the 1912 Judicial Code. In *Ex Parte American Steel Barrel Co.*, 230 U.S. 35 (1913), this Court adopted *Henry's* reasoning as to the import of the 'personal' element of the personal bias or prejudice standard and tied that element to the extra-judicial source requirement under Section 21 of the 1912 Judicial Code. *Id.* This Court further embellished the *Henry* and *Ex Parte American* holdings in *Berger v. United States*, 255 U.S. 22 (1921). Accordingly, it was well settled by the first quarter of this century that the 'personal' element of the personal bias or prejudice standard engendered the extra-judicial source requirement.

Ultimately, Section 21 of the 1912 Judicial Code evolved into 28 U.S.C. §144 in 1948.[4] Section 144 still relies on the personal bias or prejudice standard for federal judicial disqualification, which necessarily incorporates the extra-judicial source requirement.

Section 455 was significantly revised by Congress in 1974.[5] A major concern of Congress was to eliminate the subjective opinion of the judge as the basis for determining disqualification. The superseded version of Section 455 required disqualification if, "in his opinion," it was improper for a judge to sit during the proceedings.[6] Congress replaced this subjective standard with an objective standard that obliges judges to disqualify themselves when their impartiality "might reasonably be questioned." 28

Cong. Sess. III).

[3] See, Senate Doc. 1144, 62nd Cong. Sess. III, p. 7.

[4] Act of June 25, 1948, Ch. 646, 62 Stat. 898.

[5] Act of Dec. 5, 1974, Pub. L. No. 93-512, §1, 88 Stat. 1609 (codified as amended at 28 U.S.C. §455 (1982)).

[6] Act of June 25, 1948, ch. 646, §455, 62 Stat. 908.

U.S.C. §455(a). In instituting this objective standard, Congress stressed that it was doing away with the "duty to sit" rule, which such rule required a judge to stay with the case when in doubt about disqualification.[7]

In 1988, the *Liljeberg* Court settled a conflict among the federal circuit courts of appeal and held that a disqualified judge's rulings may be vacated retroactively or prospectively. *Liljeberg*, 486 U.S. at 859-862. *Liljeberg* was this Court's first decision addressing the revised Section 455(a). In arriving at its decision, the *Liljeberg* Court held that the appearance of impartiality standard encompassed within Section 455(a) was a broader standard than the Section 455(b) stricter standards. *Liljeberg*, 486 U.S. at 860 and n. 8. As a result, *Liljeberg* effectively overruled the Ninth Circuit's prior holdings that Sections 455(a) and 455(b)(1) are assessed under the same standard.

When measured against *Liljeberg* and the standards of Section 455(a) versus Section 455(b)(1), the Ninth Circuit's approach that one standard exists for Sections 455(a), 455(b)(1) and 144 no longer appears viable. The *Liljeberg* Court found that Section 455(b)(4) imported a knowledge requirement to be operative while a plain reading of Section 455(a) did not require the judge's knowledge.

Analogously, Section 455(b)(1) imports a personal requirement to assess bias or prejudice, while a plain reading of Section 455(a) does not. It is well established in the annals of the personal bias or prejudice standard that the modifier "personal" engenders the extra-judicial source requirement.[8] Since the terms "bias or prejudice" have been used interchangeably with the notion of lack of impartiality by this Court,[9] the only difference between Section

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[7] See *Judicial Disqualification: Hearing on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 1, 74-75 (1971 and 1973); H.R.Rep.No. 1453, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6255.

[8] *Berger* and *Ex Parte American* also stand for the proposition that since Section 21 of the 1912 Judicial Code, like 28 U.S.C. §144, requires an antedated claim relative to an adjudication on a matter, the source of the alleged bias or prejudice cannot come from the judge's rulings thereon. Section 455(a) imposes no antedating as that section is directed to the judge. *United States v. Sibla*, 624 F.2d 864, 867-868 (9th Cir. 1980). This is another factor in support of the claim that Section 455(a) does not embrace the extra-judicial source requirement.

[9] See *Ex Parte American*, *supra*; *Berger*, 255 U.S. at 33-34.

455(a) and Section 455(b)(1) is the "personal" modifier. The only way to construe Section 455(a) as broader than Section 455(b)(1) is to discount the "personal" element, thereby also discounting the extra-judicial source requirement. This Court should hold that the extra-judicial source requirement is not a part of Section 455(a) since that provision was revised by Congress in 1974.

VI. The Bankruptcy Judge's Personal Opinion Regarding The Social Allocation of Basketball Seating Was Derived From Extra-judicial Sources.

Boice asserts that the Bankruptcy Judge's personal opinion regarding the social allocation of basketball seating is not extra-judicial. This assertion is in error. The Bankruptcy Judge expressed his personal opinion in open court when, at the same time, he commanded the trustee in bankruptcy to file an action to procure the disputed athletic event tickets on November 30, 1989. There is no paper, pleading or motion filed in the Bankruptcy Court that would have allowed the Bankruptcy Judge to conclude that Jenkins and Sumwalt indeed possessed the athletic tickets. Boice and Jenkins had discussions in 1987 and 1988 that were not of record. During those discussions, Boice informed Jenkins that the Jenkins bankruptcy estate had no interest in the disputed athletic tickets. The Bankruptcy Judge could only have learned about the disputed athletic tickets from an extra-judicial source or *ex parte* communication. Based on the foregoing, the Bankruptcy Judge learned about the disputed athletic event tickets from extra-judicial sources and, as a result, is subject to disqualification.

VII. The Bankruptcy Judge's Authorization Of The Felony Conviction Is Quintessentially Extra-judicial.

Boice asserts that the Bankruptcy Judge's action to authorize the trustee to plea bargain a debtor corporation controlled by Jenkins to a felony[10] conviction in a state criminal proceeding, wherein both the corporation and Jenkins were defendants, is nothing more than legal error. Boice's assertion is wrong. As correctly decided by the Arizona Court of Appeals, the Bankruptcy Judge was

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[10] Boice suggests that the proposed conviction involved a misdemeanor. Opp. at p. 8. Boice misleads the Court. A violation of A.R.S. §44-1841 is a class 4 felony. A.R.S. §44-1841(B).

without jurisdiction to interfere in the state criminal proceedings. Petition at p. C-10 and C-11; *citing*, *Younger v. Harris*, 401 U.S. 37 (1971). The federal circuit courts of appeal, in interpreting *Younger's* mandate, have prescribed that federal courts must make the *Younger* exceptions inquiry prior to engaging in any other action. *Milner v. Burson*, 470 F.2d 870 (5th Cir. 1972), *cert. denied*, 411 U.S. 981, (1973); *In re Fussell*, 928 F.2d 712 (5th Cir. 1991); *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982). Not even the broad powers granted to Bankruptcy Judges under 11 U.S.C. §105 excluded their actions from the *Younger* mandate. *Barnette, supra*.

Other authorities decided by this Court support the proposition that the Bankruptcy Judge acted in the clear absence of jurisdiction. In *Stump v. Sparkman*, 435 U.S. 349 (1978), the Court distinguished "the absence of jurisdiction" concept from the "in excess of jurisdiction" concept by the following example:

> "In *Bradley*, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. *Id.*, at 352."
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> *Sparkman*, 435 U.S. at 357 n. 7; *citing*, *Bradley v. Fisher*, 13 Wall 335, 352 (1871).

The Bankruptcy Judge, analogous to the *Bradley/Sparkman* probate judge's limited jurisdiction, had a limited jurisdiction over bankruptcy matters, which jurisdiction is limited by 28 U.S.C. §157. Nothing in Section 157 empowers bankruptcy judges to interfere in ongoing state criminal proceedings, particularly to authorize the felony conviction of a criminal defendant in a state criminal proceeding. Based on the foregoing, it is unequivocal that the Bankruptcy Judge undertook the authorization of the debtor corporation's felony conviction in the state criminal proceedings in the clear absence of jurisdiction, which is quintessentially extra-judicial. As a result, both bases for the Bankruptcy Judge's disqualification are derived from extra-judicial sources.

VIII. The Issues Raised Are Worthy Of Review.

Boice asserts the issues raised in the Petition are not worthy of this Court's consideration. Petitioners have clearly demonstrated the contrary. It is important to these Petitioners, and other similarly situated bankruptcy litigants, that the Court clarify:

1) whether the mootness rule prescribed in 11 U.S.C. §363(m) eviscerates the right of appellate review, in the absence of a stay pending appeal, when a Bankruptcy Court's taking of property is flawed by substantive and procedural Due Process constitutional claims;

2) whether 28 U.S.C. §455(a) requires an extra-judicial source for disqualification after that provision was revised by Congress in 1974;

3) whether, when a Bankruptcy Judge, destined to sit as a trier of fact as well as the arbiter of law on matters to be tried by him, publicly expresses a personal opinion regarding the ultimate conclusion of the trial, a reasonable person would question the Bankruptcy Judge's impartiality;

4) whether, when a Bankruptcy Judge undertakes the authorization of a felony conviction of a debtor corporation in ongoing state criminal proceedings, a reasonable person would question the Bankruptcy Judge's impartiality; and,

5) whether, once the trustee rejects an executory contract and the Bankruptcy Court's approval thereof becomes moot because the executory contract lapses, the Bankruptcy Court has jurisdiction over post-petition executory contracts and the rights and privileges appertaining thereto.

IX. Conclusion.

For these substantial reasons, the issues raised in the Petition are worthy of this Court's review and Petitioners suggest that granting same is now in order.

Respectfully submitted,

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